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No. 98-__

IN THE

# Supreme Court of the United States

October Term, 1998

DILAWAR M. EDWARDS, Ph.D.

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; JOHN PIERCE WATKINS, Ph.D., President; NANCY Z. NELSON, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed.D., Dean in their official capacities; DAVID CAMPBELL, Chairperson, Educational Studies Dept.

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Third Circuit Court of Appeals was correct in its holding that the First Amendment provides no protection for in-class teaching by professors at public universities.

2. What is the standard of review applicable to the actions of university administrators who override the professional judgment of a tenured professor in censoring his teaching materials based on opposition to the viewpoint of the professor and his classroom materials.

3. Does a public university professor have an academic freedom right under the First Amendment, sufficient to prevail against the viewpoint-based objections of the university, to use materials that purportedly espouse religious ideas, where the materials are relevant to the course, are presented in an objective and educationally appropriate way, and are consistent with the official academic freedom policy of the university?

## PARTIES TO THE PROCEEDINGS

California University of Pennsylvania was a party at the District Court level, and was dismissed at summary judgement on Eleventh Amendment grounds. The remaining Respondents listed in the caption were parties to the proceedings in the court below.

In addition, Dr. Angelo Armenti, the current President of the University at the time of trial, was automatically substituted as a party for purposes of Petitioner's request for injunctive relief under Fed.R.Civ.P. 25 (d)(1).

The Petitioner is properly listed in the caption, and is not a corporation for purposes of Supreme Court Rule 29.6.

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**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Dilawar M. Edwards, Ph.D., hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The Court of Appeals' published decision of August 10, 1998 is reported at 156 F.3d 488 (3d Cir. 1998) (Appendix A -1) (hereafter App.).

## JURISDICTION

Judgment was entered on August 10, 1998 by the Court of Appeals affirming the judgment of the District Court which had been entered on April 16, 1997 (App. B-1). The Petitioner filed a timely Petition for Rehearing and Suggestion For

Rehearing In Banc, and the Court of Appeals denied the Petition on September 14, 1998. (App. C-1).

Jurisdiction of the Court is conferred under 28 U.S.C. sec. 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

## STATEMENT OF THE CASE

Petitioner is a veteran, tenured professor at the Respondent's University. App. A-2. Dr. Edwards received his Ph. D. from Indiana University specializing in Instructional Systems Technology. He has had a long and distinguished career with the Respondent University, including serving as past chairman of his department, and activities on numerous professional committees and projects of the University. App. Vol. I, 478-483. At the heart of this case is the "cease and desist" ban imposed by the Respondents on his selection of certain books and other classroom materials in one of the courses he regularly taught - Introduction to Educational Media ("IEM"). Id., A-3 & 4.

During the relevant time Dr. Edwards taught and developed syllabi[1] for this advanced undergraduate class. The University

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[1] Unit three of his IEM class is central to this case. A summary of slight syllabi changes over the years is attached at App. C-1. This should be contrasted with the Court of Appeal's misperception that Dr. Edwards created a "new emphasis" on such matters as bias, censorship, and religion. See: App. A-3. Dr. Edwards had been previously praised by his department chair for the syllabi, and commended by Respondent Nelson.

operates under a written Collective Bargaining Agreement ("CBA")[2] with the faculty. In the CBA the academic rights of the faculty regarding both classroom discussion and the selection of textbooks and other written class materials were expressly set-forth. That document indicates:

> B. A FACULTY MEMBER is entitled to freedom in the classroom in discussing his/her subject, but he/she should be careful not to introduce into his/her teaching controversial matter which has no relation to his/her subject.
>
> D. 1. FACULTY MEMBERS are entitled to freedom in the selection of textbooks, audio/visual aids and other teaching aids.

App. Vol. I, 281; App. Vol. I, 287.

According to the President of the University, the CBA was the "primary guiding document" governing the University. App. Vol. IV, Tr. Feb. 20, at 6. (Armenti). President Armenti stated that professors are permitted to make the decision of whether certain materials are relevant enough to include them in a course. App. Vol. III, Tr. Feb. 19 at 162. Individual faculty members have "extraordinary latitude" in making those decisions. App. Vol. IV, Tr. Feb. 20, at 19, L4-6 and L9-10 (Armenti).

Yet surprisingly, in 1989 the Vice President for Academic Affairs (Respondent Nelson) issued a written directive to Dr. Edwards to "cease and desist" using "doctrinaire material" "of a religious sort" in his IEM class.

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App. Vol. IV, Tr. Feb. 20 at 84-86; App. Vol. II, Tr. Feb. 12 at 73-75; App. Vol. III, Tr. Feb.19 at 87-89. A national educational accrediting organization which reviewed the University's syllabi had no criticisms of Petitioner's. App. Vol. IV, Tr. Feb. 20 at 74.

[2] Petitioner relied on the CBA in his arguments before the Third Circuit. Appellant's Brief ("Ap. Br."), 9-10, 29, 43, n.5. The Court of Appeals opinion, however, omitted any reference to the CBA, and failed to discuss its potential impact on the issue of the Respondent's blatant viewpoint censorship of Dr. Edwards.

App. A-3; App. Vol. I at 366. The ban applied to a list of twenty four titles[3] of suspect materials (*Id.*), that had been previously listed by name in a prior written notice from Nelson. App. Vol. I, 359. Nelson's actions were approved by the President of the University. App. A-4.

The actions taken against Dr. Edwards were due to the administration having received a single complaint by a single student in his IEM class. Id., A-3. However, the evidence at trial indicated that this complaint was a mere pretext for the Respondents' actions. The unanimous testimony of three students from Petitioner's IEM class was that Dr. Edwards did not proselytize, he used the materials appropriately, and his religious beliefs were not apparent in his conduct of the classes. App. Vol. III, Tr. Feb. 18 at 59-67 (Bryne); App. Vol. II, Tr. Feb. 12 at 160-167 (Post); App. Vol. III, Tr., Feb. 19, 143 (Landy). The Respondents presented no student testimony, not even the original complaining student.

At trial Dr. Edwards presented expert testimony from three professors from other academic institutions who testified that the materials used were relevant to the IEM class, and were within the traditional norms of academic freedom in a university setting. App. Vol. III, Tr. Feb. 18 at 27 (Dr. Smellie); App. Vol. II, Tr. Feb. 13 at 109 and 120-121 (Dr. Brown); App. Vol. III, Tr. Feb. 18 at 106 (Dr. Rothman).

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[3] One of the books listed, and ultimately banned, ironically was a book by nationally syndicated columnist Cal Thomas, titled *Book Burning*. App. Vol. I, 359. The book warned of the "subtle repression of alternative viewpoints to secularism" by such means as marginalizing a speaker by imposing the label of "fundamentalist." App. Vol. I, 342, 343. The Respondents used this method of repression against the Petitioner in blatant disregard of the CBA and the First Amendment. Respondents also targeted for censorship a book on free speech issues by attorney John Whitehead, and various materials used by Petitioner to illustrate the public debate surrounding curriculum-related issues, including the teaching of evolution, humanism, and the role of religion and parental authority in education and culture. App. Vol. I, 359-360.

Other than the testimony of Respondents themselves, no testimony was presented rebutting Petitioner's experts. [4]

In 1993, at a meeting at which Dr. Edwards was absent, Respondent Campbell, without authority, and as the new chair, revoked Dr. Edwards' IEM syllabus and later cancelled his book orders. App. A-4. App. Vol. III, Tr. Feb 18, 149., Vol. II, Tr. 13, 61-62. This action was unprecedented in the University, according to President Armenti. App. Vol. III, Tr. Feb. 19, at 172, 174.

Interestingly, from 1989 up until Campbell's intervention in the Spring of 1993, no objections had ever been raised about Petitioner's syllabi. App. Vol. III Tr. Feb. 19, 125-126. There were no written policies requiring that a syllabus, even one that was substantially revised, be approved by a faculty department (or by a Chair of the deparment, such as Respondent Campbell). App. Vol. III, Tr. Feb. 19, 170. As a result of Campbell's actions, a prior, ten year old syllabus for the IEM class was adopted by the department, in place of Dr. Edwards most current, 1991 one. App. Vol. II, Tr. Feb. 13, 61-62. Campbell used the revocation of Petitioner's syllabus as the pretext for his revocation of his IEM class book orders in the Summer of 1993. App. Vol. III, Tr. Feb. 18, 178.

The pretextual nature of these actions is clear: even the 1983 IEM syllabus resurrected by Campbell's efforts contains, in unit three, subject study in "textbook evaluation" and "criteria and guidelines to be used in media selection" for teachers (App. Vol. I, 305-306). In fact, all of the syllabi in

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[4] Dr. Edwards had developed a syllabus for IEM that contained, in unit three, discussion and readings on censoring and bias (including anti-religious bias) in the selection of classroom teaching materials E.g. App. Vol. I, 317-318. However, even Respondent Nelson conceded, in an October 6, 1989 meeting with Edwards' that "[s]he thought that censorship of media was appropriate to teach in this course . . . " App. Vol I, at 364 (top sentence) (minutes of meeting).

the record for the IEM class show that similar areas of study were always part of unit three of the class. App. D-2, 3.

Thus, Dr. Edwards disputed materials were always relevant to each IEM syllabus and the IEM course. Moreover, the practice in Petitioner's department was to assign "to those who regularly teach a given course" the authority to make any revisions deemed appropriate by that professor. App. Vol. I, 349-350 (memorandum on "updated syllabi" granting Dr. Edwards the authority for review and any of revision of "Ed. Media" [IEM] syllabus). To the same effect, see also: App. Vol. I, 378,471.

At the core of the Respondents' censorship of Dr. Edwards was their intolerance toward the "fundamentalist Christian nature" of the classroom materials. App. Vol. II, Feb. 12 at 50-51, (Respondents' *Answers to Interrogatories*).

Respondent Campbell went so far as to tell Dr. Edwards that he ought to transfer to a "fundamentalist college." App. A-4. At trial the evidence also showed that department head Campbell had targeted Dr. Edwards because Campbell was "pretty convinced" of his inclusion in the "*fundamentalist*" "spectrum," as opposed to "Episcopalian, Catholic, that sort of thing, more liberal Christian faith." App. Vol. II, Tr. Feb. 13, at 191 (emphasis added).

Petitioner brought an action under 42 U.S.C. sec. 1983 against the University and several of its administration officials. Dr. Edwards asserted that the Respondents violated his First Amendment academic freedom rights by imposing the "cease and desist" ban. He also claimed a violation of his due process and equal protection rights under the Fourteenth Amendment, and further asserted that the University officials had retaliated against him because he had filed the instant lawsuit. App. A-5.

At trial, the district court dismissed the equal protection and due process claims, and following several days of testimony, the court submitted the case to the jury on the First Amendment and retaliation claims. However, the trial court

rejected most of Petitioner's proposed jury instructions on the free speech issues, which sought to define the key term "reasonable educational [pedagogical] interest," derived from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) *on remand* 840 F.2d 596, which formed the core of the jury verdict question. App. A-3, A-5. The jury ruled for the Respondents, and Dr. Edwards appealed.

In their brief before the Court of Appeals, the Respondents clearly implied that Dr. Edwards had *some* First Amendment rights regarding the materials he used in his IEM class. *Brief for Appellees*, ("Univ. Br.") 26. (Emphasis added). In its published opinion, however, the Court of Appeals ruled that, as a "threshold" matter, professors in public universities have no First Amendment interests whatsoever as to the decisions regarding "what will be taught in the classroom." App. A-6. The Third Circuit Court of Appeals' opinion, which decimates decades of constitutional law regarding academic freedom and viewpoint censorship, must be reviewed, and reversed.

## REASONS FOR GRANTING THE WRIT

Petitioner, Dr. Dilawar M. Edwards, is a respected, tenured professor. The Respondents, officials of Petitioner's university, imposed a procedurally irregular, ideologically driven ban on various classroom materials selected by Petitioner in his professional judgment because they were perceived to contain religious ideas and because Respondents labeled Petitioner as a religious "fundamentalist," while permitting all other faculty unfettered freedom to select classroom materials pursuant to the written CBA.

The Third Circuit approved this astonishing spectacle of viewpoint censorship under the even more astonishing premise that the actions of the Respondents implicated no First Amendment rights of Petitioner, while ignoring the unanimous student testimony at trial that Dr. Edwards never attempted to proselytize, and ignoring the opinions of three separate academic freedom experts that Petitioner's use of the

materials was relevant and appropriate for the class. The Third Circuit opinion is a radical obliteration of academic freedom. This Court should grant writ of certiorari in this case three reasons.

First, this startling opinion of the Third Circuit is clearly wrong. The Court of Appeals decision itself cites, as support, only cases involving curriculum-related expressive conduct of high-school teachers, rather than university professors. No case law from either the other circuits, or from this Court, has determined that a public university professor has no First Amendment interest at stake in the selection of materials used or the matters he or she discusses in class. Yet this is the remarkable holding of the Court of Appeals in this case.

Second, although there is a deep and diverse split among the courts of appeal of several circuits as to the proper standard of review applicable to in–class speech of a university professor, the Third Circuit decision is at variance with all of them.

Third, the Respondent University had adopted the widely accepted 1940 Statement of Principles on Academic Freedom of the American Association of University Professors (AAUP) in its written CBA, which granted professors the freedom to discuss even controversial matters in class as long as it has any relevance to the subject. Another provision of the Universities' CBA granted faculty "freedom in the selection of textbooks, auto-visual aids and other teaching aids." These express policies of the University created the equivalent of either a designated public forum (or at a minimum, a nonpublic forum) for First Amendment purposes. The actions of the Respondents were motivated by the desire to suppress what they saw as "fundamentalist" viewpoints, no matter how educationally relevant to the class, or objectively presented by Petitioner.

If academic freedom is to is to retain its status as "a special concern of the First Amendment" under *Keyishian v.*

*Board of Regents*, 385 U.S. 589, 603 (1967), this case must be reviewed, and reversed.

## I. WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE IN ORDER TO CLARIFY THE CONSTITUTIONAL BASIS OF INDIVIDUAL ACADEMIC FREEDOM

### A. THE COURT OF APPEALS MISTAKENLY ASSUMED THAT INDIVIDUAL PROFESSORS HAVE NO FIRST AMENDMENT PROTECTION FOR THEIR IN-CLASS SPEECH

The Third Circuit has stated:

> We do not find it necessary to determine whether the District Court's instruction adequately defines the "reasonably related to a legitimate educational interest" [*Hazelwood*] standard because, as the threshold matter, we conclude that a public university professor does not have a First Amendment right to decide what will be taught in the classroom.

App. A-6.

It is clear that the Third Circuit has determined that, in any conflict between the expressive activity of a professor in a classroom regarding curriculum-related issues and the university, the rights of the university are *absolute*. However, that conclusion collides with the established academic freedom jurisprudence of this Court.

In the context of a conflict between a student who had been dismissed by the university, and the university itself, this Court noted in *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), that:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's

> professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norm as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

474 U.S. 225 (citations omitted).

It is clear that in a conflict between a student who challenges the university's academic decisions, and the university itself, the university's autonomy is not absolute. Why then, in the context in the expressive academic rights of the professor, should we assume that the rights of the university are absolute?

Admittedly, *Regents of University of Michigan* utilized a "narrow avenue for judicial review" in a challenge to a university's decision to dismiss a student. *Supra*, 474 U.S. 227. Nevertheless, this Court has *never* held that there should be *no* avenue for judicial review of free speech conflicts between professors and their academic institutions.

### B. ACADEMIC FREEDOM HAS BEEN INCONSISTENTLY DEFINED HISTORICALLY IN TERMS OF INDIVIDUAL RIGHTS AS WELL AS INSTITUTIONAL RIGHTS

For several decades a First Amendment jurisprudence of this Court has developed in which academic freedom has been defined, inconsistently, as belonging to the individual professor, and, at the same time, belonging to the academic institution.[5] However, in sharp contrast to the decision of the

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[5] As the Court of Appeals indicated in its decision below, this Court has previously noted that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself," citing *Regents of University of Michigan v. Ewing*, *supra* 474 U.S. 214, 226 n. 12 (citations omitted). App. A-8.

Third Circuit, this Court has *never* undermined the vitality of academic freedom of the individual faculty member.

In *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) this Court noted that when it came to concerns about the danger of government censorship "in the intellectual life of the university:"

> It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.

*Sweezy, supra* 354 U.S. 261 (Frankfurter, J., concurring).

In *Sweezy*, the State of New Hampshire sought to hold a professor in contempt for failing to answer questions, posed to him by the State, relating to his political affiliations. It was the *individual* professor, not the institution, cited for contempt in that case. Thus, it is clear that the principles of academic freedom in *Sweezy* were established in the context of the plight of an individual professor, not the institutional rights of the university.

In *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967) this Court protected faculty members of a state university from the offending statute on the basis that academic freedom "is therefore a special concern of First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

The Court noted, within its rhetorical question, the implications for classroom instruction when academic freedom is threatened:

> And does the prohibition of distribution of matter "containing" the [subversive] doctrine bar histories of the evolution of Marxist doctrine or tracing the background of the French, American, or Russian revolutions? . . . It would be a bold teacher who would not stay as far as possible from utterances or acts

> which might jeopardize his living by enmeshing him in this intricate machinery.

*Keyishian*, at 385 U.S. 601.

In the context of issues relating to the Establishment Clause, this Court has noted that "[a]cademic freedom," as "it is commonly understood," includes the definition used by the Court of Appeals in *Edwards v. Aguilard*, 482 U.S. 578, 585, n. 6 (1987) that:

> Academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment.[6]

The decision of the Third Circuit must be reviewed so that a sensible balance can be struck between the academic freedom of professors and the discretion of the university.

### C. BOTH THE CONTOURS OF ACADEMIC FREEDOM AND THE CONFLICT BETWEEN THE RIGHTS OF INDIVIDUAL PROFESSORS AND ACADEMIC INSTITUTIONS NEED CLARIFICATION

There is a compelling need for clarification of the parameters of individual academic freedom of faculty when in conflict with the academic discretion of the university.

Several Courts of Appeal have noted both the need for clarification by this Court of the nature of individual

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[6] The Third Circuit Court of Appeals notes that this quoted language "simply describes the conclusion of the Court of Appeals in that case," and does not represent the conclusion of the Supreme Court. App. A-8 & 9, n.2. However, on a closer examination of the context of the above quote from *Edwards v. Aguilard* it is clear that the Court considered the description of academic freedom as used by the Court of Appeals in that case to have a least represented what "might, in common parlance, be understood, as referring to ... the freedom of teachers to teach what they will." *Edwards v. Aguilard*, at 482 U.S. 586.

academic freedom, and the resolution of the conflict between individual and institutional concepts of such freedom. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971 (9th Cir. 1996) ("[n]either the Supreme Court nor this Circuit Court has determined what scope of First Amendment protection is to be given a public college professor's classroom speech"); *Piarowski v. Illinois Community College District 515*, 759 F.2d 625, 629 (7th Cir.), *cert.denied*, 474 U.S. 1007 (1985)(Judge Posner explaining that the term academic freedom "is used to denote both the freedom of the academy to pursue its end without interference from the government ... and the freedom of the individual teachers ... to pursue his end without interference from the academy; and these two freedoms are in conflict"); *Hillis v. Stephen F. Austin State University*, 665 F.2d 547, 553 (5th Cir.), *cert.denied*, 457 U.S. 1106 (1982)(academic freedom noted to be recognized in the case law but is ill-defined).

Academic freedom scholars have noted the need to define academic freedom, and the need to resolve the conflict between individual academic freedom of the professor and the autonomy of the university as an institution: Allen Charles Kors & Harvey A. Silverglate, *The Shadow University - The Betrayal Of Liberty On America's Campuses*, 65 (1998) ("[t]o this day the U.S. Supreme Court has not resolved the direct conflict between assertions of individual versus institutional academic freedom ... "); Harry F. Tepker, Jr. & Joseph Harroz, Jr., *On Balancing Scales, Kaleidoscopes And The Blurred Limits of Academic Freedom*, 50 Okla. L. R. 1, 20 (1997)(noting the Court's "failure to provide adequate guidelines in this area," referring to in-class academic freedom rights of professors); Donna Prokop, *Controversial Teachers Speech: Striking A Balance Between First Amendment Rights And Educational Interest*, 66 S. Cal. L. R. 2533, 2538 (1993)("[t]he Supreme Court has never directly decided the degree to which the First Amendment protects teacher's in-class speech"); D. Grant Carwile, *Constitutional Law-Freedom of Religious Speech - When Freedom of Speech in The Classroom Conflicts with the Establishment Clause*, 14

U. Ark. Little Rock L. R. 83, 87 (1991)("[d]espite volumes of litigation in this general area, the Supreme Court has yet to squarely address the extent to which a public school teacher's right to freedom of expression in the classroom supersedes the right of school officials to determine course and curriculum content"); J. Peter Byrne, *Academic Freedom: a Special Concern of the First Amendment*, 99 Yale L. J. 252, 253 (1989)("The problems are fundamental: There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles."); Note, *Academic Freedom and the University Title VII Suit after University of Pennsylvania v. EEOC and Brown v. Trustees of Boston University*, 43 Vand. L. Rev. 1571, 1581 (1990); ("[a]lthough courts have been using the term 'academic freedom' since 1952, critics charge that courts have neither defined the term adequately nor expounded on which rights academic freedom protects and why")(citations and footnotes omitted).

See also: Neil Hamilton *Zealotry And Academic Freedom*, 187 (1995) ("Supreme Court cases mentioning 'academic freedom' have been few and vague. As a consequence, lower court opinions dealing with the concept have been confused and contradictory"); David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 Law & Contempt. Probs. 227, 281 (1990)("[n]o case to date has presented the Court with a direct conflict between institutional and individual claims of first amendment freedom"); Note, *Bishop v. Aronov: Religion-Tainted Viewpoints are Banned from the Marketplace of Ideas*, 49 Wash. & Lee L. Rev. 1557, 1557-58 (1992)("[t]he Supreme Court only partially has defined the notion of ... 'academic freedom'"); Note, *Beyond "The Freedom to do Good and not Teach Evil": Professor's Academic Freedom Rights in Classrooms of Public Higher Education*, 26 Wake Forest L. Rev. 711, 733 (1991)("[d]ivergent views clearly exist among the courts"

regarding the concept of individual academic freedom regarding curriculum-related expression).

This case illustrates that "[t]hreats to individual academic freedom come from the state as well as the university administration." Susan L. Pacholski, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. Chi. L. Rev. 1317, 1321 (1992).

It is worth noting that the CBA of the Respondent University in this case, adopted the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors (AAUP). Those principles state:

> Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.

AAUP, Policy Documents and Reports, 3 (1990).

More than one hundred and fifty academic and educational organizations and societies have endorsed the AAUP academic freedom standard. Id., 7-9. Unless the constitutional standing of *individual* academic freedom is defined by this Court, universities will continue to adopt the AAUP standards, lulling individual faculty into the belief that their such policies reflect established constitutional law.

Under the faulty reasoning of the Third Circuit in the decision below, public universities may pass such "academic freedom" policies, yet arbitrarily revoke them as to individual faculty members whose classroom materials espouse viewpoints that are unpopular or politically incorrect.

Such a result converts the promise of academic freedom under the First Amendment into an inviting, but empty, mirage.

## II. THERE IS A SPLIT OF AUTHORITY AS TO THE PROPER STANDARD OF REVIEW FOR THE CLASS-ROOM TEACHING OF A PROFESSOR IN A PUBLIC UNIVERSITY

### Introduction

The legal geography encompassing disputes over the academic freedom rights of public university professors is chaotically charted, and inconsistently mapped. A variety of differing tests have evolved in the six circuits that have addressed the issue.

### A. THE *HAZELWOOD* CASES

In *Hazelwood School District v. Kuhlmeir*, 484 U.S. 260 (1988) this Court, in the context of the curriculum-related expressive conduct of high school students, ruled that such expression within a school newspaper involved a "non-public forum." 484 U.S. at 270. As such, the guiding principle applied to school officials who sought to restrict student speech was that such restrictions must be imposed in a "reasonable manner." *Id.*, at 270, citing *Perry Education Association v. Perry Local Education Association*, 460 U.S. 37 (1983). Ruling that the appropriate test was whether the decision of the secondary school district was pursuant to a "reasonable pedagogical interest" (*Hazelwood*, *supra* at 273), this Court distinguished the speech in that case from the non-curriculum related expression present in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

This Court expressly raised the possibility, without deciding, that "school sponsored expressive activity at the college and university level" may not require the "same degree of deference" to the school's district decision-making as was applied in that case. *Hazelwood*, at 274, n 7.

## The *Hazelwood* Test Applied At The University Level

Cases in the Eleventh and First Circuits have applied the *Hazelwood* test to the curriculum-related expressive conduct of university professors.[7] *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) *cert.den.*, 505 U.S. 1218(1992); *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1994).

In *Bishop* the Court utilized the *Hazelwood* test but modified it by analyzing fact-specific factors such as the context of the professor's speech, the potential coercive affect on the students, the university's interest as an employer, and the interests of academic freedom. 926 F.2d at 1074-1075.

The Third Circuit recognized that its *per se* rule, which holds that professors have no First Amendment rights regarding curriculum-related expressive conduct, conflicted with that in *Bishop*, where that Court was noted to have found "that a public university's restrictions on a professor's in-class speech 'implicate[d] First Amendment freedoms.'" App. A-7.

In the *Bishop* case the Court cited approvingly to *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971) (per curium). *Bishop*, 926 F.2d 1073-1074. The *Mailloux* decision, in turn, had previously been harmonized with *Hazelwood* in *Ward v. Hickey*, 998 F.2d 448, 452-53 (1st Cir. 1993) (*Hazelwood/Mailloux* applied to curriculum-related speech of a high school teacher).

The *Hazelwood* test, as harmonized with *Mailloux* in *Ward v. Hickey* was applied to the in-class expressive conduct of a university professor in *Silva v. University of New Hampshire*, 888 F. Supp. 293, 313-314 (D.N.H. 1994). (Sexual harassment policy as applied to university professor's

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[7] At trial in this case both parties submitted jury instructions to the trial court based on the *Hazelwood* test. The court rejected Petitioner's instructions, which sought to define the key phrase: "reasonable pedagogical interest." The Court of Appeals declined to reach the issue of the appropriateness of the jury instructions. App. A-6.

classroom speech is not *reasonably* related to the legitimate pedagogical purpose of providing a congenial academic environment because it employs an impermissibly subjective standard that "fails to take into account the nation's interest in academic freedom").[8]

**_Hazelwood_ Test Applied To High School Curriculum-Related Speech Of A Teacher**

Decisions from four circuits have applied *Hazelwood* to the curriculum-related expressive conduct of teachers in public high school. *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir. 1989); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993); *Silano v. Sag Harbour*, 42 F.3d 719 (2nd Cir. 1994); and *Miles v. Denver Public School*, 944 F.2d 773 (10th Cir. 1991).

In *Kirkland* the Court of Appeals applied *Hazelwood* in analyzing the conduct of a probationary high school teacher who disregarded the school district's process for approving a reading list.[9]

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[8] The court in *Silva*, after noting a split among the various Courts of Appeals of several circuits with regard to whether the *Hazelwood* test applies to in-class professorial speech, or whether the tests developed under *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), should apply, chose to also separately apply the *Connick-Pickering* tests. *Silva*, at 888 F. Supp. 314-17, 315, n. 16. The court found that a professor's in-class sexually explicit speech which offended several students was deemed to be a matter of "public concern" and was determined to "overwhelmingly" outweigh the interest of the university in restricting such speech pursuant to its sexual harassment policy.

[9] In the case at bar, the Third Circuit of Appeals cited the *Kirkland* decision in support of its conclusion that Dr. Edwards had no First Amendment rights to use certain curriculum materials. However, the Third Circuit reliance on Kirkland is misplaced. Unlike that case, the Respondent University here had delegated to the faculty the academic freedom to make curriculum decisions. See: App. A-7.

In *Ward v. Hickey*, *supra*, the First Circuit ruled that a prior First Circuit opinion (*Mailloux v. Kiley*, *supra*) was "consistent with the Supreme Court's test as set out in [*Hazelwood v.] Kuhlmeir*." 996 F.2d 453. The Court in *Ward*, while adopting the *Hazelwood* framework did not (in contrast to the Third Circuit in the case below) rule that teachers have *no* First Amendment rights with regard to curriculum-related speech.

In *Silano v. Sag Harbour*, *supra*, the court, treating a guest lecturer as a teacher[10] for First Amendment purposes, applied *Hazelwood*, and determined that the showing of pictures of bare-chested women was entirely "unnecessary to illustrate" the scientific phenomenon of "persistence of vision" which was the subject of the class. 42 F.3d at 723.

In *Miles v. Denver Public School*, *supra*, the Tenth Circuit Court of Appeals specifically considered, but rejected, the *Pickering* test, because "it does not address the significant interest of the State as educator." 944 F.2d 777. The court applied *Hazelwood* to find a "pedagogical interest" that justified discipline imposed on a ninth grade public school teacher for his in-class comments regarding rumors about the sexual activities of students on school grounds.

## B. THE CONNICK-PICKERING CASES

### Introduction

In *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court established the analytical framework for the First Amendment rights of public employees. Under the test developed in those cases, the inquiry is, first, whether the speech of the public employee is a matter of

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[10] The Court noted that "Silano's lecture took place in a traditional classroom setting and was designed to impart a particular knowledge to the student participants .. " *Silano*, at 42 F.3d 723.

"public concern," and if so, then whether the free speech interests of the employee outweigh the interests of the employer in the operational efficiency of the public agency.

While this Court has yet to rule on the question of whether the *Connick-Pickering* test applies to *in-class, curriculum-related* speech of a professor, *Connick-Pickering* has been applied to *out-of-class* speech of a university professor.

In *Harleston v. Jeffries*, 513 U.S. 996 (1994), *cert.granted and vacating Jeffries v. Harleston*, 21 F.3d 1238, this Court reversed the judgment of the Court of Appeals for the Second Circuit in a case involving the *out-of-class* expression of a university professor who was removed from his department chairmanship as a result of his controversial statements. This Court instructed the Court of Appeals to reconsider its decision in light of *Waters v. Churchill*, 511 U.S. 661, (1994), a case that had further refined the *Connick-Pickering* analysis as applicable to the free speech rights of public employees.

### *Connick-Pickering* Test Applied At The University Level

The Sixth and Second Circuits have exclusively applied the *Connick-Pickering* test to in-class, curriculum-related expression of university professors: *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995); *Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994).

In *Dambrot, supra*, the Court of Appeals held that a university coach's use[11] of a racial epithet was not a matter of "public concern" under *Connick-Pickering*. 55 F.3d 1185-91.

In *Blum, supra*, the Court of Appeals applied *Connick-Pickering* to hold that a university law professor who made both in-class and out-of-class comments on the legalization of

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[11] The Sixth Circuit noted that the coach's "use of the N-word is even further away from the marketplace of ideas and the concept of academic freedom because his position as coach is somewhat different from that of the average classroom teacher." Dambrot, at 55 F.3d 1190.

marijuana and criticisms of national drug control policy, constituted comments on matters of public concern, and that the professor's free speech interest outweighed the interest of the university in the efficiency of providing educational services in it's law school.[12]

### *Connick-Pickering* Applied To High School Teachers: No Academic Freedom Rights Per Se

In *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998)(en banc), *cert.den.*, ___ U.S. ___ (1998), the Fourth Circuit applied *Connick-Pickering* to the selection, by a high school teacher, of a controversial play to hold that the editing of the play by the principle was appropriate because the teacher's selection of the play "does not present a matter of public concern and is nothing more than an ordinary employment dispute." 136 F.3d 368.

The end result of the reasoning in *Boring*, is that *any* curriculum-related selection of materials by a high school teacher is excluded from First Amendment protection as a matter of law whether under *Connick-Pickering* or under *Hazelwood*.

## C. THE "PER SE" RULE OF THE THIRD CIRCUIT

In the case at bar, the Third Circuit has flatly ruled that university professors have no First Amendment rights relating to the use of classroom materials or curriculum-related expression. *Edwards v. California University of Pennsylvania*, 156 F.3d 188 (3d Cir. 1998), *reh.den.*, ___ F.3d ___ (1998).

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[12] At least one Court has noted that in *Blum*, "[t]he Second Circuit did not distinguish between Blum's in-class remarks and pedagogy on the one hand, and his out-of-class expressions, on the other. Instead, the Court simply applied the *Pickering* balancing test to Blum's speech as a whole." *Scallet v. Rosenblum*, 911 F. Supp. 999, 1010 n.10 (W.D.Va. 1996).

The Court of Appeals for the Third Circuit has held that the expressive conduct of Professor Edwards involved the role of the university as speaker. As such, under *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) the university may make arbitrary decisions, and may even commit viewpoint-based acts of censorship, with impunity. After reviewing *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985) and *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), the Court of Appeals concluded:

> In sum, caselaw from the Supreme Court and this court on academic freedom and the First Amendment compel the conclusion that Edwards does not have a constitutional right to chose curriculum materials in contravention of the University's dictates.[13]

App. A-8 & 9.

The decision of the Third Circuit Court of Appeals is a final, and fatal blow, to the concepts of individual academic freedom of a professor. Under its reasoning, even the most outlandish and malicious acts of viewpoint-motivated censorship will be permitted under the reasoning the "the University can make content-based decisions when shaping its curriculum." App. A-8. It is possible, however, that the Third Circuit Court of Appeals understood the danger of giving a university limitless discretion to censor its faculty. Perhaps the Court was referring to the substantial evidence in the record of anti-religious bias by the university's administrators and department chairman when it noted:

> Nothing in our opinion should be read to mean that we condone all of the conduct of the University officials that was revealed at trial.[14]

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[13] The "dictates" of the University were not neutral policies, but were, in fact, an academic act of view-point censorship against Petitioner's classroom material, at odds with the CBA, ill-defined, and overly broad.

[14] The Court noted statements by Petitioner's department chairman that petitioner was an "embarrassment to the department" (apparently referring to the religious content of his classroom materials) and suggested

## D. THE OTHER TESTS APPLIED TO CURRICULUM-RELATED EXPRESSION OF PROFESSORS IN THE CLASSROOM

The Courts of Appeal from the Ninth and Sixth Circuits have affirmed the in-class, curriculum-related academic freedom rights of college professors without reliance on either *Hazelwood* or the *Connick-Pickering* test.

In *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996) the Court of Appeals held that a university professor's First Amendment rights were violated by an unconstitutionally vague sexual harassment policy as applied to his in-class speech, but did not utilize the tests under either *Hazelwood* or the *Connick-Pickering* cases.

The Sixth Circuit Court of Appeals, noting that "the Courts have also afforded substantial protection to the First Amendment freedoms of individual university professors," has held that a non-tenured university professor's free speech rights were violated when the university compelled him to change the grade of a student against his professional judgment. *Parate v. Isibor*, 868 F.2d 821, 826-830 (6th Cir. 1989)(citing neither *Hazelwood* nor the *Connick-Pickering* cases).

## E. THE "SUBSTANTIAL DEPARTURE" TEST

In *Regents of University of Michigan v. Ewing*, *supra*, this Court indicated that judges should overturn a "genuine academic decision" of a college or university only if "it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." 474 U.S. 225. In *Regents of University of Michigan*, this principle of deference

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that he would be better suited to teach at a "fundamentalist college" rather than a public university. App. A-4. The record is replete, however, with numerous other incidents of anti-religious bigotry leveled against Petitioner.

to institutional judgments was applied in the context of student expulsion decisions.

However, this Court extended the reach of the "substantial departure" test in *University of Pennsylvania v. EEOC*, 439 U.S. 182 (1990). In that case, this Court emphasized that deference to decision-making decisions of a university only applied to "legitimate academic judgments," and that the autonomy of an institution's academic decisions relating to the granting or denial of faculty tenure was not absolute. This Court held that the peer review materials of the tenure committee of the University of Pennsylvania were subject to subpoena in a faculty member's discrimination claim which alleged that denial of her tenure was based on factors of race and gender. 493 U.S. 199, citing *Regents of University of Michigan, supra.*

In the Third Circuit opinion below, the Court of Appeals, while citing *Regents of University of Michigan* for the proposition that institutional academic freedom is protected under the First Amendment, failed to also apply the rule in that case that academic decisions of a university can be challenged if they represent a "substantial departure" from excepted academic norms which evidence a lack of professional judgment.[15]

However, this Court has given no indication as to whether the "substantial departure" test should be applied also to disputes between a faculty member who, in accord with written policies, uses certain curriculum-related classroom materials and the university which then sanctions him for doing so because of the viewpoints of those materials. This case calls for clarification of that issue.

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[15] At trial the Petitioner presented the testimony of three academic experts who cast substantial doubt as to the "professional" judgment of the Respondents. The Third Circuit opinion also contains an indication that the Court may have had its own suspicious. *See*, App. A-11.

## III. THE THIRD CIRCUIT OPINION PERMITS A PUBLIC UNIVERSITY TO COMMIT VIEWPOINT-CENSORSHIP AS TO UNPOPULAR VIEWPOINTS WHILE DELEGATING ACADEMIC FREEDOM RIGHTS TO POPULAR ONES

The Decision of the Court of Appeals in this case is inconsistent with the view of this Court that even a non-public forum in a public school setting, created by a collective bargaining agreement, may not be selectively permitted to some but denied to others in order "to discourage one viewpoint and advance another," nor can it be "motivated by a desire to suppress ... views." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 49, n.9 (1983).

Fatal to the Court of Appeal's opinion in this case is its misreading of *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) as the basis for its result. *Rosenberger* distinguished between those occasions where "it is the University speaking ..." in which case the government can "regulate the content of what is or is not expressed ...," *supra*, at 515 U.S. 833-34 (cited at App. A-7 & 8), and those situations where it "expends funds to encourage a diversity of views from private speakers," in which case it "may not discriminate based on the viewpoint of private persons whose speech it facilitates ..." *Id.*

The decision below assumes, without analysis, that the respondent University was a government "speaker" (App. A-7 & 8) when it imposed its viewpoint curriculum ban against Dr. Edwards's use of classroom materials. However, the University here *did not* retain its absolute control over curriculum, because it had *relinquished* its position as "government speaker" when, through the written CBA, and through actual practice, it delegated to the individual faculty members the control over the content of what the professors would be "discussing" in the classroom and what "textbooks ... and other teaching aids ..." they would be using.

Because the University here made this general delegation of curriculum control to promote a "diversity of views" (*Rosenberger, supra*) among its faculty, the University is therefore prohibited from arbitrarily discriminating against one of those views merely because of the viewpoint of the material to be used. Further, it is clear that the University *itself* had treated its faculty more like "private speaker[s]" pursuant to their academic freedom policies, than mere government actors paid to articulate a specific government position, as was the case in *Rust v. Sullivan*, 500 U.S. 173 (1991).

Thus, Petitioner more closely resembles the private, non-government speakers in *Rosenberger*, than the government-subsidized (and government controlled) speaker in *Rust*.

Further, this Court noted in *Rust* that the university setting is an exception to the rule that permits government to control the contents of expression that it subsidizes:

> Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the first Amendment, *Keyishian v. Board of Regents, State Univ. of N.Y.*, 385 U.S. 589, 603, 605-606, 17 L Ed 2d 629, 87 S Ct 675 (1967).

*Id.*, 500 U.S. 201.

In this case the University's own "primary guiding document," the CBA, portrays the individual faculty member as an autonomous speaker rather than a University spokesperson who is paid to merely promote a specific government position.

Thus, the Court of Appeal's presumption that the University was, itself, the "speaker" regarding curriculum choices it had delegated to individual professors, a delegation

accompanied by "extraordinary latitude" given to faculty members (according to the testimony of University President Armenti) is contrary to the written policy of the University embodied in the CBA, and collides with the history of academic freedom as espoused in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).[16]

Admittedly, there is debate among academic freedom scholars as to whether the First Amendment *requires* the university to delegate academic decisions to faculty, or prohibits it from the general power to undo those delegations based on viewpoint-neutral academic factors. Mark G. Yudof, *When Government Speaks: Politics, Law And Government Expression In America*, 135-38, 240-45 (1983).

However, there appears to be *no* scholarship that concludes that a revocation of a prior delegation of academic freedom authority may, consistent with the First Amendment, be accomplished "for the *purpose* of *censoring particular ideas*." David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 Law and Contemp. Probs., 276, n. 240 (1993) (citing Yudof, *Id.*, 243).

The Third Circuit opinion also collides with two recent Supreme Court articulations of the limits of viewpoint discrimination in non-public fora. In *Arkansas Educational Television Commission v. Forbes*, 523 U.S. ___, 118 S.Ct. 1633 (1998) this Court held that a television debate on a public station among contenders for an upcoming election, although determined to be a "nonpublic forum," nevertheless did not imply an absolute power of censorship by the

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[16] It is also curious that the Third Circuit opinion cites *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985) and *Regents of Univ. v. Bakke*, 438 U.S. 265 (1978) (App. A-8) as its source for notions of academic freedom. Those cases involved student expulsion or admission, and did not deal with the expressive rights of teachers.

government, and that even speech in a non-public forum cannot be unreasonably censored based on viewpoint factors.

A few weeks after *Forbes* this Court decided *National Endowment for the Arts v. Finley*, 523 U.S. ___, 118 S.Ct. 2168, 66 U.S.L.W. 4586 (1998), ruling that the NEA grant process (which necessarily involved rejecting more grant requests than it was able to accept) did not resemble the "indiscriminate[] 'encourag[ing] [of] a diversity of views from private speakers'" (at 66 U.S.L.W. 4590) as was involved in *Rosenberger*. However, it was also emphasized that government may not "leverage its power into a penalty on disfavored viewpoints." 66 U.S.L.W. 4591.

Under this view, the Third Circuit decision must be reviewed by this Court, and reversed.

## CONCLUSION

For the foregoing reasons the Court should grant this Petition For Writ Of Certiorari.

Respectfully submitted,

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December 11, 1998

## APPENDIX


A-1 Court of Appeals Opinion (August 10,1998)

B-1 Court of Appeals Judgment (August 10, 1998)

C-1 Court of Appeals Order Denying Petition for Rehearing (September 14,1998)

D-1 Summary Comparison of Syllabi from the Record

Filed August 10, 1998

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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No. 97-3285

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DILAWAR M. EDWARDS, Ph.D.
Appellant
v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA;
JOHN PIERCE WATKINS, Ph.D., President;
NANCY Z. NELSON, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed.D., Dean in their official capacities; DAVID CAMPELL, Chairperson, Educational Studies Dept.

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ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 91-01668)

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Argued: March 13, 1998

Before: STAPLETON and ALITO, *Circuit Judges*, and O'KELLEY, *District Judge*•

(Opinion Filed: August 10, 1998)

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• Hon. William C. O'Kelly, United States Judge for the Northern District of Georgia, sitting by designation.

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**OPINION OF THE COURT**

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ALTO, Circuit Judge

Appellant Dilawar M. Edwards, a tenured professor at the California University of Pennsylvania, brought this action pursuant to 42 U.S.C. § 1983, alleging that the University and its officers ("the University") violated several of his constitutional rights. Specifically, Edwards claimed that the University deprived him of his rights to free speech, due process, and equal protection by restricting his choice of classroom materials, criticizing his teaching performance, and suspending him with pay for a portion of one academic term. In addition, Edwards alleged that the University retaliated against him for filing this lawsuit.

Prior to trial, the district court dismissed Edward's equal protection claim and granted summary judgment in favor of the University on Edwards's due process claim. The case then went to trial on Edwards's First Amendment and retaliation claims, and a jury returned a verdict for the University. On appeal, Edwards assigns as error: 1) the district court's First Amendment jury instruction; 2) the district court's grant of summary judgment on his due process claim; 3) the district court's dismissal of his equal protection claim; 4) the district court's ruling that the verdict was not against the great weight of the evidence; and 5) the district court's decision not to permit a third amended complaint. We affirm.

I.

During the time-period at issue in this case. Professor Edwards taught a course at the University entitled "Introduction to Educational Media" (IEM). Syllabi from the early 1980s indicated that the IEM course initially focused on how teachers can effectively use various classroom tools, such as projection equipment, chalkboard, photographs and films. *See* App. 1 at 299-306. Later syllabi prepared by Edwards, however, included a new emphasis on issues of bias, censorship, religion, and humanism, and Edwards listed numerous publications concerning these issues as required or suggested reading. *Id.* At 307-37.

In May 1989, one of Edwards students complained to University officials that Edwards had used the IEM class to advance religious ideas. On August 14, 1989, the University's Vice President for Academic Affairs, Nancy Nelson, wrote a letter to Edwards in which she outlined the student's concerns and indicated that a meeting on the issue would be held in the fall. Nelson met with Edwards and other school officials to discuss the complaint and, on November 28, 1989, Nelson wrote to Edwards and directed that he "cease and desist" from using "doctrinaire material[s]" of a religious nature. App. 1 at 366. Edwards appealed this

decision to the President of the University, John Pierce Watkins, and the two exchanged letters through July 1990. Watkins expressed his approval of Nelson's actions and directed Edwards to avoid advancing religious beliefs through his lectures and handouts. Dr. Edwards continued to teach the IEM course during the 1991 and 1992 school years.

In 1992, Professor David Campbell was named chair of the Education Department at the University. Upon assuming this position, Campbell became concerned that Edwards had "interjected something that didn't belong in the [IEM]" course [:] A district bias on religion and religious questions." App. II, Trial Tr. 2/13/97, at 38. After concluding that Edwards was teaching from a non-approved syllabus, Campbell brought the issue to the department faculty during the Spring 1993 term, and the faculty voted to reinstate an earlier version of the IEM syllabus. Relying on the earlier syllabus, Campbell revoked certain book orders that Edwards had made for the Fall 1993 semester and, when Edwards objected, Campbell told him that he could put the matter on the agenda for the September 1993 faculty meeting. Campbell testified that Edwards never asked that the matter be placed on the meeting's agenda.

In the weeks prior to the Fall 1993 term, Professor Edwards's schedule was rearranged, and he was assigned to teach an additional course — "Educational Tests and Measurements" (ETM) — that he had never taught. Edwards was dissatisfied with the change, and Campbell received complaints that Edwards failed to attend some of his ETM classes and walked out of others. At the September 1993 faculty meeting, Campbell and Edwards engaged in an exchange in which Campbell called Edwards an "embarrassment to the department" and made comments to the effect that Edwards might be better suited to a "fundamentalist college[]" than a "public university." App. 1 at 391, 400. A non-verbatim account of the meeting was distributed to all members of the Education Department.

In response to the student complaints about Edwards's ETM class, school administrators put together a packet of

materials that they wished to discuss with Edwards. The administration scheduled a meeting for Monday, October 25, 1993, but apparently did not mail the packet to Edwards until Friday, October 22, 1993. Upon arriving at the meeting, Edwards stated that he had not received any materials in the mail and he asked for additional time to prepare. App. I at 408-10. At this point, Nancy Nelson relieved Edwards of his duties, with pay, until he was ready to discuss the University's concerns. *Id.* at 411. Edwards remained suspended with pay for the remainder of the semester but returned to the classroom for the Spring 1994 term to teach two ETM courses and one IEM course.

Edwards initially brought suit against the University in September 1991, alleging violations of his First Amendment free speech rights, his Fourteenth Amendment due process rights, and his rights under the Establishment Clause. In October 1991, Edwards filed an amended complaint which included an equal protection claim. After his suspension in 1993, Edwards filed a second amended complaint which contained a free speech claim, a retaliation claim, a due process claim, and an equal protection claim. The district court granted summary judgment on Edwards's due process claim in January 1997, and the court denied Edwards's motion for reconsideration in February 1997. On February 11, 1997, the first day of trial, the district *sua sponte* dismissed Edward's equal protection claim for failure to state a claim and denied Edwards's motion to file a third amended complaint. The case then went to trial on Edwards's First Amendment and retaliation claims.

Before submitting the case to the jury, the district court held a conference on jury instructions and rejected much of Edwards's proposed First Amendment instruction. After the jury returned a verdict for the University, Edwards moved for a new trial. The district court denied Edwards's motion, and Edwards appealed.

II.

A.

Edwards first contends that the district court inadequately instructed the jury on the issue of whether the University violated his First Amendment rights by restricting his "choice of curriculum materials and the content and subjects of his classes." Appellant's Br. at 27. Although Edwards agrees with the standard given by the district court — that the University had to show that its actions were "reasonably related to a legitimate educational interest," App. IV, Trial Tr. Feb. 25, 1997, at 26 — Edwards argues that the district court did not adequately explain this standard and, thus, "permitted the jury to speculate on the parameters of freedom of speech." Appellant's Br. at 24. Specifically, Edwards contends that the district court failed to provide guidance in the following four areas: 1) the necessity of avoiding viewpoint discrimination; 2) the strength of a professor's academic freedom rights; 3) the correct legal standard regarding the discussion of religious issues in public classrooms; and 4) the existence of a professor's right to choose his curriculum materials absent an official school policy.

We do not find it necessary to determine whether the district court's instruction adequately defined the "reasonably related to a legitimate educational interest" standard because, as a threshold matter, we conclude that a public university professor does not have a First Amendment right to decide what will be taught in the classroom. This conclusion is compelled by our decision in *Bradley v. Pittsburgh Bd. Of Educ.*, 910 F.2d 1172 (3d Cir. 1990), where we explained that "no court has found that teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates." *Id.* at 1176. Consistent with this observation, we concluded that "[a]lthough a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is

protected, her in-class conduct is not." *Id.* (citation omitted).[1] Therefore, although Edwards has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom. *Accord Boring v. Buncombe County Bd. Of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (in banc) ("We agree... that the school, not the teacher, has the right to fix the curriculum."); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989) ("Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula.") But *see Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) (finding that a public university's restrictions on a professor's in-class speech "implicate[d] First Amendment freedoms").

Our conclusion that the First Amendment does not place restrictions on a public university's ability to control its curriculum is consistent with the Supreme Court's jurisprudence concerning the state's ability to say what it wishes when it is the speaker. The following passage from *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), addresses this issue in the university context:

> [W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when

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[1] Edwards interprets *Bradley* as holding that "in the absence of an official existing school policy prohibiting" a professor from selected certain classroom materials, a professor has a First Amendment right to choose his curriculum materials. *See* Appellant's Br. at 28. This interpretation ignores: 1) the *Bradley* court's instruction that public school teachers must abide by "school policy or *dictates*" when choosing their curriculum. 910 F.2d at 1176 (emphasis added): 2) the court's broad conclusion that a public school teacher's "in class conduct is not" protected by the First Amendment, *id.*; and 3) the fact that the school in *Bradley*, like the University here, took action without establishing an official policy. *Id.* at 1174.

> it is the speaker or when it enlists private entities to convey its own message . . . . It does not follow, however, . . . . that viewpoint-based restrictions are proper when the University does not speak itself or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.

*Id.* at 833-34. Since the University's actions in the instant case concerned the "content of the education it provides." *Id.* at 833, we find that the University was acting as speaker and was entitled to make content-based choices in restricting Edward's syllabus.

Edward's reliance on the principle of academic freedom does not affect our conclusion that the University can make content-based decisions when shaping its curriculum. The Supreme Court has explained that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226, n.12 (citations omitted). The "four essential freedoms" that constitute academic freedom have been described as a university's freedom to choose "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (quotations omitted).[2] In sum, caselaw from the Supreme

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[2] Edwards contention that the Supreme Court has elsewhere defined academic freedom as the "principle that individual instructors are at liberty to teach that which they deem to be appropriate," Appellant's Br. at 31, is incorrect. The case cited for this proposition, *Edwards v. Aguillard*, 482 U.S. 578 (1987), reaches no such conclusion. Rather the passage relied upon by Edwards simply describes the conclusion of the court of appeals

Court and this court on academic freedom and the First Amendment compel the conclusion that Edwards does not have a constitutional right to choose curriculum materials in contravention of the University's dictates. Accordingly, we affirm the district court's decision not to grant a new trial on this issue.

B.

Edward's second contention is that the district court erred when it granted summary judgment for the University on his procedural due process claim. The district court initially ruled on this issue prior to trial, concluding that, "because Edwards was suspended with pay, he cannot prove that he was deprived of a property interest deserving due process guarantees." App. I at 138. Edwards moved for reconsideration on the ground that the district court's opinion did not adequately consider whether he had been deprived of a liberty interest. The district court denied Edward's motion, explaining that he had not "pleaded facts sufficient to make out a liberty interest claim regarding reputation." App. II. Feb 12, 1997 Trial Tr. At 12. We agree.

This court has previously held that "[s]tigma to reputation alone, absent some accompanying deprivation of present or future employment, is not a liberty interest protected by the fourteenth amendment," *Robb v. City of Philadelphia*, 733 F.2d. 286, 294 (3d Cir. 1984). *See also Strum v. Clark*, 835 F.2d 1009. 1012 (3d Cir. 1987) (explaining that the Supreme Court has required "both damage to reputation and the extinguishment of government employment as a predicate for due process protection."). Since it is undisputed that Edwards remained employed with pay at all times relevant to this case, his claim is barred by our decisions in *Robb* and *Strum*. While Edwards's temporary

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in that case. *Id.* 586 n.6. At no point in *Aguillard*, which is an Establishment Clause case, does the Court define academic freedom for purposes of the Free Speech Clause.

removal from class duties may have further stigmatized him, this action does not constitute a deprivation of employment. Therefore, we will affirm the district court's grant of summary judgment on Edwards's due process claim.

C.

Edwards next contends that the district court improperly dismissed his equal protection claim. In making this argument, Edwards places considerable reliance on facts that came out at trial. *See* Appellant's Br. at 42: Appellant's Reply Br. at 18. However, the district court dismissed Edwards's equal protection claim prior to trial because Edwards's counsel admitted that the second amended complaint did not adequately allege an equal protection violation. *See* App. II., Feb. 11, 1997 Trial Tr. At 9-10, 74-75.[3] Under these circumstances, Edwards is not entitled to revive his equal protection claim on appeal.

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[3] The relevant exchange between the district court and Edwards's trial counsel, Jack Parson, proceeded as follows:

| | |
|---|---|
| The Court: | What do think you need to do to make out an equal protection claim, don't you have to show persons similarly situated were treated in a different manner because of participation in a protected class? |
| Mr. Carson: | That's the criteria. |
| The Court: | Where's that allegation? |
| Mr. Carson: | In this amended complaint, it is not there, not specifically set out. |
| The Court: | This is the complaint. Okay. You are saying no equal protection argument in the second amended complaint? |
| Mr. Carson: | No, Your Honor. |
| The Court: | There is none? |
| Mr. Carson: | No. |

App. II. Feb 11, 1997 Trial Tr. at 9-10.

D.

Edwards's final two contentions — that the verdict was against the great weight of the evidence and that he should have been allowed to file a third amended complaint on the first day of the trial — are both without merit. Accordingly, we affirm the district court's resolution of both issues.

III.

In sum, we conclude: 1) that Professor Edwards does not have a First Amendment right to choose classroom materials and subjects in contravention of the University dictates; 2) that Edwards failed to state a procedural due process liberty claim because he did not allege a deprivation of employment; and 3) that the district court properly dismissed Edwards's equal protection claim after Edwards's own counsel conceded that the complaint failed to adequately state such a claim. We find Edwards's remaining arguments on appeal to be without merit. Accordingly, we affirm. We emphasize that we only pass on the narrow legal issues presented to us. Nothing in our opinion should be read to mean that we condone all of the conduct of the University officials that was revealed at trial.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

B-1

UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

No. 97-3285

DILAWAR M. EDWARDS, Ph. D.
Appellant

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; JOHN PIERCE WATKINS, Ph. D., President; NANCY Z. NELSON, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed. D., Dean in their official capacities; DAVID CAMPBELL, Chairperson, Educational Studies Dept.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (D.C. NO. 91-cv-01668)

Present: Stapleton, and Alito, Circuit Judges, and O'Kelley[1], District Judge*

**JUDGMENT**

This cause on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on March 13, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered on April 16, 1997, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

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[1] Honorable William C. O'Kelley, United States District Judge for the Northern District of Georgia, sitting by designation.

ATTEST:

/s/ P. Douglas Sifo
Clerk

Dated: August 10, 1998

C-1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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97-3285

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DILAWAR M. EDWARDS, Ph. D.,
Appellant,

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; JOHN PIERCE WATKINS, Ph.D., President; NANCY Z. NELSON, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed.D., Dean in their official capacities; DAVID CAMPBELL, Chairperson, Educational Student Dept.

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SUR PETITION FOR REHEARING

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Present: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, LEWIS, and RENDELL, Circuit Judges, and O'KELLEY, District Judge*

The Petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/

Circuit Judge

DATED SEP 14 1998

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* As to Panel rehearing only.

**FROM THE SYLLABI IN THE RECORD BEFORE THE COURT OF APPEALS**

**AT APP. VOL. I, 299-321**

**A COMPARISON OF THE LISTED TOPICS 1 THROUGH 11 IN UNIT THREE**

AS NUMBERED IN THE ***1980 & 1983 SYLLABI*** WITH THE CORRESPONDING LISTED TOPICS ***IN UNIT THREE*** IN THE ***1985*** *SYLLABUS* AND IN THE ***1990 SYLLABUS*** FOR EDF 304: INTRODUCTION TO EDUCATIONAL MEDIA

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**1. Television**

UNIT THREE: **(1985) 3-credit Syllabus:**

Intro to television: types of transmissions; kinds of programming; sources of fund. Television: ETV, ITV, CCTV, CATV, ITFS, The Fourth Network; Instructor-Directed Television. Implications of commercial television programming and values for the educator/teacher/student.

**UNIT THREE: (1990) 3-credit Syllabus:**

**Broadcast Television: types of transmissions: kinds of programming; sources of funding, Television: ETV, ITV, CCTV, CATV, ITFS, The Fourth Network; Instructor Directed Television Videotape Recording and Videodiscs Implications of commercial television programming and values for the educator/ teacher/student.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**2. Principles of Video Tape Recording**

UNIT THREE: **(1985) 3 credit Syllabus:**

**Principles of Video Tape Recording; Microteaching**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**3. Textbook Evaluation**

UNIT THREE: **(1985) 3-credit Syllabus:**

Textbook Evaluation, Censorship, Book-burning, the First Amendment and print and non-print media.

**UNIT THREE: (1990) 3-credit Syllabus:**

**Textbook Evaluation, Censorship, indoctrination, thought control, academic freedom, the First Amendment, and print and non-print media materials and textbooks.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**4. Future Trends in Education**

UNIT THREE: (1985) 3-credit Syllabus:

Future Trends in Educational Media and Technology.

**UNIT THREE: (1990) 3-credit Syllabus:**

**Future Trends in Educational Media and Technology.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**5. Future Trends in Media**

UNIT THREE: **(1985)3-credit Syllabus:**

Future Trends in Media selection, utilization and evaluation.

**UNIT THREE: (1990) 3-credit Syllabus:**

**Future Trends in Media selection, utilization and evaluation.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**6. Criteria and Guidelines To Be Used In Media Selection**

**UNIT THREE: (1985) 3-credit Syllabus:**

Criteria and Guidelines to be used in Media selection and evaluation.

**UNIT THREE: (1990) 3-credit Syllabus:**

**Criteria and Guidelines to be used in Media evaluation and selection.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**7. Pennsylvania's Intermediate Unit**

UNIT THREE: (1985) 3-credit Syllabus:

Pennsylvania's Intermediate Units, ERIC, microfilm, microcards, microfiche.

**UNIT THREE: (1990) 3-credit Syllabus:**

**Pennsylvania's Intermediate Units, ERIC, microfilm, microcards, microfiche.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**8. Community Resources**

UNIT THREE: (1985) 3-credit Syllabus:

Community Resources, Media Packages, Media Products and Programmed Instruction.

UNIT THREE: (1990) 3-credit Syllabus:
Community Resources, Media Packages, Media Products and Programmed Instruction.

**UNITED THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**9. Free and Inexpensive Materials**

UNIT THREE: **(1985) 3-credit Syllabus:**
Free and Inexpensive Materials; Sponsored materials; Biases in materials.

**UNIT THREE: (1990) 3-credit Syllabus:**
**Free and Inexpensive Materials; Sponsored materials; Biases in materials.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**10. Teacher Evaluation Forms; Reference; Interviews**

UNIT THREE: **(1985) 3-credit Syllabus:**
Selection and Evaluation Forms and techniques. Discussion on criteria-formulation and application.

**UNIT THREE: (1990) 3-credit Syllabus:**
**Evaluation and Selection Forms and techniques. Discussion on criteria formulation and application.**

**UNIT THREE: (1980) 2-credit Syllabus & (1983) 3-credit Syllabus, are identical:**

**11. Course Evaluation**

UNIT THREE: **(1985) 3-credit Syllabus:**

Test #3 and Essay Test
Final Laboratory Test

**UNIT THREE: (1990) 3-credit Syllabus:**

Interactive Learning Media.
Copyright rules. AECT Code of
Professional Ethics.
Test #3 and Essay Test
Final Laboratory Test

Source: App. Vo. I, 299-302, 303-306
307-319, 321-338; App. Vol. IV,
Tr. Feb. 24, 5-9, 23-24.

Supreme Court, U.S.
FILED
JAN 13 1999
CLERK OF THE CLERK

No. 98-964

# In the Supreme Court of the United States

OCTOBER TERM, 1997

DILAWAR EDWARDS,
*Petitioners*

*v.*

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; *et al.*,
*Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13pp

## QUESTION PRESENTED

Whether a public university professor has a First Amendment right to choose the curriculum for use in a university sponsored course when his choice contravenes the express policy of the institution?

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## STATEMENT OF THE CASE

The question in this case is who has the ultimate authority to make curriculum decisions for courses offered at a public university: the school's administrators or the professors assigned by the university to teach those courses. Petitioner, a tenured professor, alleged that university officials violated his right to free speech under the First Amendment by directing him to "cease and desist" from using certain textbooks and other materials of a religious nature which they decided had no bearing on the education course which he had been assigned to teach. Pet. App. at A2-3.

1. Petitioner has been a tenured professor in the education department at the California University of Pennsylvania for over fifteen years. Pet. at 2. During the time-period at issue in this case, petitioner was assigned to teach a course entitled "Introduction to Educational Media" (IEM). Pet. App. at A3. The course was originally designed to introduce students to the use of media in the classroom and to develop skills in creating an effective learning environment. *Id.* However, petitioner subsequently revised the course syllabus to include materials advocating the teaching of "creationism" and attacking the teaching of evolution, "secular humanism," and a perceived liberal bias in the media. *Id.*

University officials received complaints from students that petitioner was using books and other materials to advocate his personal religious views in the classroom. *Id.* Although he was directed on several occasions, both in writing and in person, to discontinue using the disputed materials from 1989 through 1993, petitioner failed to comply with the administration's request, even after the education department's curriculum committee voted to re-approve the original syllabus for the IEM

course. *Id.* at A4-5. As a result of the ongoing dispute, university officials scheduled a meeting to discuss their concerns. *Id.* When petitioner claimed that he was unprepared for the meeting, he was suspended with pay until he was prepared to address the University's concerns. *Id.* at A5. Petitioner's suspension was lifted and he returned to the classroom at the beginning of the 1994 Spring semester. *Id.*

2. In the midst of this dispute, petitioner commenced the present action in September 1991 in the District Court for the Western District of Pennsylvania seeking damages and injunctive relief for alleged violations of his constitutional rights pursuant to 42 U.S.C. §1983. In the second amended complaint filed in October 1993, petitioner alleged that respondents had deprived him of his right to free speech, due process, and equal protection by placing restrictions on the curriculum which could be included in the IEM course, criticizing his teaching methods, and suspending him with pay from his teaching duties for a portion of the 1993 Fall Semester. Petitioner additionally alleged that respondents had retaliated against him for filing this lawsuit. *Id.* at A2.

The District Court dismissed prior to trial all petitioner's claims except his free speech and retaliation claims. Those claims were then tried before a jury. *Id.* At the conclusion of the evidence, the District Court instructed the jury that to prevail respondents had to show that their actions were "reasonably related to a legitimate educational interest." *Id.* at A6. The jury returned a verdict in favor of respondents on both the free speech and retaliation claims. *Id.* at A3.

3. In the Court of Appeals, petitioner argued that he was entitled to a new trial because the District Court's jury instruction on the standard to be applied under the First

Amendment was improper. *Id.* at A6. Although petitioner agreed with the District Court that the correct standard was whether the university's actions were "reasonably related to a legitimate educational interest," as enunciated in this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), he argued that the District Court did not sufficiently explain this standard so as to allow the jury to apply it to the particular facts of this case. Pet. App. at A6.

The Court of Appeals, however, did not reach this question because it held that "as a threshold matter . . . a public university professor does not have a First Amendment right to decide what will be taught in the classroom." *Id.* In reaching this conclusion, the Court of Appeals found that under the facts of this case, involving a purely internal institutional dispute over the choice of in-class curriculum, the "University itself was acting as speaker and was entitled to make content-based choices in restricting [petitioner's] syllabus." *Id.* The Court of Appeals also relied extensively on this Court's decisions in *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985), and *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), in which the rights of a public university as a speaker in shaping its own curriculum and the parameters of academic freedom under the First Amendment were addressed. Pet. App. at A7-9. Accordingly, the Court of Appeals affirmed the District Court's decision to deny a new trial. *Id.* at A11.

## REASONS FOR DENYING THE WRIT

### The Court Of Appeals Applied Well Settled Law About Which There Is No Circuit Conflict.

According to petitioner, the Court of Appeals held that "the First Amendment provides no protection for in-class teaching by professors at public universities." Pet. at i. This is incorrect. Nothing in the Court of Appeals' decision suggests that professors' in-class speech is *never* protected by the First Amendment. Rather, the Court of Appeals addressed the much narrower question of whether such professors may override decisions of the university on the content of the university curriculum. In holding that professors have no First Amendment right "to choose classroom materials and subjects in contravention of university dictates," Pet. App. at A11, the Court of Appeals was fully in accord with the decisions of this and other courts.

Petitioner maintains that there is a "compelling need for clarification of the parameters of individual academic freedom of faculty when in conflict with the academic discretion of the university." Pet. at 12. But the right of public universities to make curriculum decisions is well established by decisions of the Court. *See Rosenberger v. University of Virginia*, 515 U.S. 819, 833 (1995) ("when the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed . . . ."); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (restrictions on student speech in school newspaper permissible regulation of curriculum under First Amendment); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985) (recognizing university's autonomous right to make academic decisions in upholding dismissal of student from

graduate program); *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (university has right to determine "who may teach, *what may be taught*, how it shall be taught, and who may be admitted to study") (*emphasis added*). This case is simply not the proper vehicle to address petitioner's broader concerns about the limits of academic freedom in our society.[1]

Moreover, the circuit conflict petitioner perceives is illusory. Almost all the cases petitioner cites either do not involve a university or other academic institution as employer, or involve speech outside the classroom.[2] Of the cases cited to

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[1] Petitioner argues, *inter alia*, that this Court should review the Third Circuit's decision in this case to clarify whether the standard adopted by this Court in *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) ("genuine academic decision" of a college or university should be overturned only if "it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment"), should be used in reviewing curriculum based decisions. This issue was not raised in the District Court or the Court of Appeals. In fact, this Court's decision in Ewing is not discussed or even cited to in petitioner's brief to the Third Circuit.

[2] The petition includes a lengthy discussion of the First Amendment protections afforded public employees under *Connick v. Meyers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education*, 391 U.S. 563 (1968). However, the *Connick-Pickering* line of cases involve adverse employment actions affecting a property or liberty interest while the present case does not. Most of the cases cited by petitioner are further distinguishable because they do not involve the in-class speech of professors at a public university.

by petitioner which actually do involve in-class speech, none holds that a university professor or public school teacher has a First Amendment right to override the curriculum-based decisions of his or her employer. *See Ward v. Hickey*, 998 F.2d 448 (1st Cir. 1993) (school may terminate teacher for statements made during class regarding abortion so long as it gives prior notice that topic is not part of approved curriculum); *Blum v. Schegel*, 18 F.3d 1005 (2d Cir. 1994) (law school professor failed to establish that denial of tenure was the result of statements made in and out of class advocating legalization of marijuana); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Ed.*, 42 F.3d 719 (2d Cir. 1994) (upholding school board's censure of guest lecturer); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. ) (upholding transfer of teacher for selection of inappropriate material for school play), *cert. denied*, ___ U.S. ___, 119 S.Ct. 47 (1998); *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547 (5th Cir.) (university administration's decision to change grade over objection of professor does not infringe rights under First Amendment), *cert. denied*, 457 U.S. 1106 (1982); *Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991) (teacher's comments made during class regarding sexual relationship of two students not protected under First Amendment).

The only appellate decision cited by petitioner which addresses the specific issue of curriculum-related speech by a university professor is *Bishop v. Aranov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992). However, in *Bishop* the Eleventh Circuit held that a public university did not violate a professor's free speech rights by prohibiting him from interjecting his personal religious beliefs during class time or conducting optional classes to discuss the Christian perspective on academic topics. Accordingly, both the court in *Bishop* and the Court of Appeals in the present case, under very similar facts,

reached the same conclusion regarding the rights of public universities to control the in-class curriculum-related speech of professors. Any differences between the reasoning or analysis employed by the two courts in reaching this result are not substantial enough to warrant granting the petition.[3]

Far from being in conflict, the courts of appeals are in consensus with the Third Circuit's conclusion that an individual professor does not have a right to override the curriculum decisions of a public university under the First Amendment. *See, e.g.*, *Ward*, 998 F.2d 448, 453 (1st Cir.) ("teacher's statements in class during an instructional period are . . . part of [the] curriculum and a regular class activity. . . . subject to reasonable speech regulation."); *Silano*, 42 F.3d 719 (2d Cir.) (school board's censure of guest lecturer invited to speak in classroom on

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[3] Petitioner maintains that the standard of review used by the Court of Appeals in this case is inconsistent with the balancing test established by this Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding restrictions on expression of students in school newspaper) and relied upon by the Eleventh Circuit Court of Appeals in *Bishop*. However the Court of Appeals in the present case did not repudiate the balancing test used in *Hazelwood* or even suggest that such an approach was not appropriate. Rather, it merely concluded that any error by the District Court in explaining the "reasonably related to a legitimate educational interest" standard was immaterial under the particular facts of this case since the interest of the university in controlling its curriculum is always a legitimate educational interest which outweighs the free speech interests of professors. Furthermore, even if petitioner were correct that the Third Circuit should have engaged in the same balancing approach used in *Hazelwood*, there is no reason to believe that the outcome would have been different since the jury instruction used by the district court in this case was modeled on language from that case.

subject related to curriculum did not violate First Amendment); *Boring*, 136 F.3d 364, 370 (4th Cir.) (*en banc*) ("we agree with Plato and Burke and Justice Frankfurter [in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957] that the School, not the teacher, has the right to fix the curriculum"); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989) ("Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula."); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972) (teacher's disagreement with school officials concerning content of curriculum not a matter of public concern protected by First Amendment), *cert. denied*, 411 U.S. 972 (1973). Petitioner has simply failed to show that the decision by the Court of Appeals in this case conflicts with the holdings of this Court in *Rosenberger*, *Hazelwood*, and *Ewing*, or any of the numerous circuit court decisions he cites.

## CONCLUSION

For these reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

**Respectfully submitted,**

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No. 98-964

In The

# Supreme Court of the United States

October Term, 1998

DILAWAR M. EDWARDS, Ph.D.,

*Petitioner,*

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; JOHN PIERCE WATKINS, Ph.D., President; NANCY Z. NELSON, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed.D., Dean in their official capacities; DAVID CAMPBELL, Chairperson, Educational Studies Dept.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF OF AMICI

**The Association of American Educators
The Association For Supervision And Curriculum Development
The Association For Educational Communications and Technology**

**In Support of Petitioner**

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## QUESTION PRESENTED

1. Whether the Third Circuit Court of Appeals was correct in applying the standard of public secondary school cases to that of a university professor and concluding that a professor does not have a First Amendment academic freedom right to choose classroom materials and subjects in contravention of the University dictates?

## PARTIES TO THE PROCEEDINGS

California University of Pennsylvania was a party at the U.S. District Court level, and was dismissed at summary judgment on Eleventh Amendment grounds. The remaining Respondents listed in the caption were parties to the proceedings in the court below.

In addition, Dr. Angelo Armenti, the current President of the University at the time of trial, was automatically substituted as a party for purposes of Petitioner's request for injunctive relief under Fed.R.Civ.P. 25 (d)(1).

The Petitioner is properly listed in the caption, and is not a corporation for purposes of Supreme Court Rule 29.6.

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## JURISDICTION[1]

Judgment was entered on August 10, 1998 by the Court of Appeals affirming the judgment of the District Court which had been entered on April 16, 1997 (App. B-1). The Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing In Banc, and the Court of Appeals denied the Petition on September 14, 1998 (App. C-1).

Jurisdiction of the Court is conferred under 28 U.S.C. sec. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

## INTEREST OF AMICI

As organizations serving a membership that includes thousands of professors, teachers, students and scholars, it behooves us to defend the First Amendment rights of the faculty, especially those that relate to faculty rights and protections as guaranteed by the Collective Bargaining Agreement and the Constitution of the United States.

## STATEMENT OF THE CASE

*Amici* incorporate herein by reference the facts as delineated by Petitioner in his Petition for Writ of Certiorari.

## SUMMARY OF THE ARGUMENT

Academic freedom at a university level is of a different nature than at the high school/secondary level. The Third Circuit ***erred*** when it applied the *Bradley v. Pittsburgh Bd. Of Educ.*, 910 F. 2d 1172 (3rd Cir. 1990) case – a secondary school case and set of facts – to the university level. There are key distinctions between high school and university students, and distinctive settings between high school versus university classrooms, and between the credentials of high school teachers and university professors. There is a fundamental necessity of academic freedom for the university level professor regardless of whether it is a state or private college or university.

Professor Edwards has been denied the right that every other professor at this university has to exercise his

or her professional judgment about the selection and use of teaching materials in courses they teach. This has been done on the basis of a procedurally irregular, ideologically driven abuse of power by administrators who believe that the use of materials including references to religions and/or containing world-views or ideas based in religions or any consideration or references to religions and/or expression of a conservative and pro-religious (but not partisan or proselytizing) point of view, is tantamount to "fundamentalism," and must be excluded from a public university.

## ARGUMENT

### ACADEMIC FREEDOM AT A UNIVERSITY LEVEL IS OF A DIFFERENT NATURE THAN AT THE HIGH SCHOOL/SECONDARY LEVEL.

The Third Circuit Court of Appeals, at App. A-6, cites the *Bradley v. Pittsburgh Bd. Of Educ.*, 910 F. 2d 1172 (3rd Cir. 1990) *a public* ***school*** case where it explained that:

> No court has found that *teachers'* First Amendment rights extend to *choosing their own curriculum* or *classroom management techniques* in contravention of *school policy or dictates.* (emphases added)

The court then proceeds to apply the above public *school* case to a public *university:*

> We conclude that a public *university professor* does not have a First Amendment right to decide *what will be taught* in the classroom.

If **a public school** and **a public university** ***are the same*** – and there are ***no*** differences – then the court's logic would be understandable and acceptable.

Inasmuch as public schools and public universities differ, and **do differ very significantly**, the court's reasoning is erroneous, and ***must be reversed***.

There are many differences between schools and universities in institutional governance, and differing characteristics and level of maturity of the target group served, such as: pupils /students /freshmen /sophomores /juniors /seniors /undergraduates /graduate /scholars /doctoral /post-doctoral candidates; classroom environment, educational setting, type of instruction, and major differences in methods and requirements between schools and universities.

The Third Circuit Court of Appeals has erroneously used case-law that is relevant to secondary schools and applied it to universities.

Case-law for schools is determined within a framework of: public ***school*** pupils/students (who are more immature and impressionable than university students); ***school teachers*** (*not* required to specialize with an earned terminal degree, and professionally are somewhat limited); ***school*** settings (moderate expectations and restrictive educational governance and policy).

The frame of reference at universities is quite different from schools in that there are: public ***university*** students /scholars (who are older /mature /quite sophisticated); ***university tenured professors*** (who are highly qualified in their fields – an earned terminal

degree – and have earned tenure, and have professional autonomy and exercise professional judgment); ***university*** settings with Collective Bargaining Agreements and stated policies meant specifically for fostering higher education and higher learning, and the pursuit of truth.

Therefore, case law for *school* cases and *school teachers* is quite *inappropriate* application to *universities* and *university professors*.

In *Kirkland v. Northside Indep. Sch. Dist.*, 890 F. 2d 794, 800 (5th Cir. 1989) the Court refers to "teachers" (not university professors), and "school curricula," and says:

> Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon ***teachers*** the control of public ***school curricula***. (emphases added)

The court again refers to: a *school* case, to *school teachers*, to *"school* policy or *dictates,"* and *"choosing their* ***curriculum,"*** and emphasizes:

> the Bradley court's instruction that public school teachers must abide by 'school policy or *dictates'* **when choosing their curriculum**. (emphasis added)

The court somehow fails to distinguish between *curriculum* and *curriculum* ***materials***. *To be "choosing their* ***curriculum"*** is an *entirely different matter than it is to be choosing their curriculum* ***materials***.

Significantly, the Third Circuit's academic freedom standard is found in *Keyishian* and *Tinker*. *Bradley v. Pittsburgh Bd. Of Educ.*, 910 F. 2d 1172, 1176 (3rd Cir. 1990):

> We do not have to delineate the scope of [teachers'] academic freedom . . . under the First Amendment . . . See Tinker . . . [and] Keyishian- . . . courts have found this right to encompass **the right to exercise professional judgment in selecting topics and materials for use in class.** (emphasis added)

The court has asserted that:

> the First Amendment does not place restrictions on a public university's ability to control its curriculum. App. A-7

The university arguably may have some influence or control on the faculty university-wide curriculum committee on which professors are involved in making curriculum decisions.

Nevertheless, the Third Circuit Court of Appeals has erred in *failing to maintain **very significant and crucial differences and distinctions among terms such as***: "curriculum" "course" "subjects" "topics" "course outline" "syllabus" "curriculum materials," "teaching materials," etc.

## ACADEMIC FREEDOM IS A WELL-RECOGNIZED CONCEPT AT THE UNIVERSITY LEVEL AS OPPOSED TO THE SECONDARY LEVEL AND MUST BE PROTECTED

The Association for Educational Communications and Technology's Code of Professional Ethics requires that professors:

> 1. Shall encourage independent action in an individual's pursuit of learning and shall provide access to varying points of view.
>
> 2. Shall protect the individual rights of access to materials of varying points of view.
>
> 8. Shall in the design and selection of any educational program or media seek to avoid content that reinforces or promotes gender, ethnic, racial or religious stereotypes. Shall seek to encourage the development of programs and media that emphasize the diversity of our society as a multi-cultural community.

App. I, Ex. No. 469

In 1987, The Association for Supervision and Curriculum Development came out with a report entitled: *Religion in the Curriculum: A Report from the ASCD Panel on Religion in the Curriculum.* Of the many excellent points made, of particular relevance to Dr. Edwards' efforts as a teacher educator with his students were the following recommendations by the ASCD Panel:

> **1. Teacher Educators, both preservice and inservice, should ensure that teachers acquire not only the substantive knowledge required to teach about religion in society but also the attitudes and understanding necessary to treat the subject with sensitivity in the classroom.**
>
> **2. Teachers, administrators and members of the public should be aware of the impact of court decisions on the curriculum and should recognize that teaching about religion is not unconstitutional.**
>
> **3. State departments of education should address the issue of fair and factual treatment**

> **of religion in the curriculum by all local education agencies.**
>
> **4. Textbook selection committees at the state, district and local school levels should require such treatment of religion in all curricular materials . . .**
>
> **5. Publishers should revise textbooks and other instructional materials to provide adequate treatment of diverse religions and their roles in American and world culture and to include appropriate religious and moral themes in literary and art history anthologies.**

App. Vol. III, Tr. Feb. 19, 3-4

The American Association of University Professors (AAUP) was formed to stem the erosion of academic freedom for professors who faced reprimand or dismissal for making statements or acting in a manner displeasing those in authority. *Professors on Guard: The First AAUP Investigations,* (W. Metzger ed. 1977). Its founding document, the *Declaration of Principles* (1915), recognized the need for the university to set a basic curriculum and established that *the independence of the professor regarding classroom method and scholarly view is essential in maintaining the intellectual integrity of the professor and the university.* It defined academic freedom in the classroom:

> It is scarcely open to question that freedom of utterance is as important to the teacher as it is to the investigator. No man can be a successful teacher unless he enjoys the respect of his students and their confidence in his intellectual integrity . . . this confidence will be impaired if there is suspicion on the part of the student that the teacher is not expressing himself fully or

> frankly, or that college and university teachers in general are a repressed and intimidated class who dare not speak with the candor and courage which youth always demands in those whom it is to esteem.

*General Report of the Committee on Academic Freedom and Tenure*, I AAUP Bulletin 17 (1915), reprinted in 53 Law and Contemporary Problems 393, 398 (1990).

In its Declaration of Principles (1915) the AAUP set forth that the university's authority over the university professor is not that of "a public employer which may reasonably restrict the speech rights of employees." Instead, **the professor is an *"appointee"*** and . . . once appointed, the scholar has professional functions to perform in which the appointing authorities have neither competence nor moral right to intervene."

*Law and Contemporary Problems* at 397. The professor's function is **one of an appointed professional with a specialized competence in his academic area**. This competence has been recognized by, and must be free from interference by those in authority.

The 1915 document has been refined as to the rights accorded tenured professors. The A.A.U.P.'s 1940 *Statement of Principles of Academic Freedom and Tenure*, (and Interpretive Comments thereto) is now widely accepted by university professors and universities:

> . . . institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

American Association of University Professors, "Policy Documents and Reports" 1, 3 (1984). Controversial thought and inquiry are "at the heart of the free academic inquiry which the entire statement is designed to foster." A.A.U.P., Policy Documents and Reports, 1970 Interpretive Comments at 5. The A.A.U.P. recognizes the tenured professor's right to free and full inquiry of the subject matter under his instruction, since the common good requires "free" search for truth and the discussion of controversial ideas. ***These concepts have long been recognized by both professors and the courts,*** *and A.A.U.P. academic freedom principles are often incorporated into faculty contracts* – (e.g., **the Collective Bargaining Agreement between SSHE and APSCUF** App. 117, 975) – M. Olivas, *The Law and Higher Education: Cases and Materials on Colleges in Court,* 134 (1989). **Courts refer to the A.A.U.P. declarations** as indicia of general practice or custom when faculty contracts are ambiguous, acknowledging the importance of the above-stated basic tenets. W. Kaplin, *The Law of Higher Education* '3.6.1 at 180 (2nd Ed. 1985).

The U.S. Supreme Court has long recognized the importance of academic freedom and protected it under the First Amendment, recognizing the importance of the teacher's "free play of the spirit" to the preservation of academic integrity:

> It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very

> atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied them.

*Wieman v. Updegraff*, 344 U.S. 183, 195 (1952).

University students are less impressionable than younger students and are able to appreciate that the university's policy is one of neutrality toward religion. *Tilton v. Richardson*, 403 U.S. 672 (1971). *Widmar v. Vincent*, 454 U.S. 263, 274 n. 14 (1981).

Thus university professors have more latitude in choosing their **subject matter** than those who teach younger students, *Peloza v. Capistrano Unified School District*, 782 F. Supp. 1412, 1417 (C.D. Cal. 1992), even regarding controversial **subjects** such as Origins. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

## CONCLUSION

For the foregoing reasons the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

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DILAWAR M. EDWARDS, Ph.D.,

*Petitioner,*

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; JOHN PIERCE WATKINS, Ph.D., President; NANCY Z. NELSON, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed.D., Dean in their official capacities; DAVID CAMPBELL, Chairperson, Educational Studies Dept.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF OF *AMICUS CURIAE* INTERCOLLEGIATE STUDIES INSTITUTE IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. Does the First Amendment permit a government university to censor a tenured professor's in-class comments and suggested reading materials offered in the course of interacting with university-approved curriculum based solely upon their viewpoint?

2. Does a professor at a public university, which operates under a collective bargaining agreement that guarantees academic freedom, to its faculty, speak as the government or as an individual when making in-class comments and offering suggested out-of-class reading material while interacting with university-approved curriculum?

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B. The Court should grant the petition in order to distinguish between a government university's right to choose courses and shape curriculum, and a professor's freedom to interact with students and curriculum within the guidelines set by the University ..... 6

C. Alternatively, even if a university could regulate a professor's in-class speech and suggested reading materials on university-approved topics, it may not do so solely on the basis of viewpoint ..... 9

II. THE IN-CLASS COMMENTS AND SUGGESTED LITERATURE OF A PROFESSOR AT A PUBLIC UNIVERSITY CANNOT BE CONSTRUED AS GOVERNMENT SPEECH WHEN

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## INTERESTS OF AMICUS CURIAE[1]

The Intercollegiate Studies Institute (ISI) is a non-profit, non-partisan, tax-exempt educational organization whose purpose is to convey to successive generations of college youth a better understanding of the values and institutions that sustain a free society. This purpose is advanced by a recognition that college campuses must be free from ideological discrimination. To that end, ISI articulates and defends the ideas of a free society, in particular the concept of academic freedom, on America's college campuses. Through an integrated program of lectures, conferences, publications, and fellowships, the ISI annually works with hundreds of thousands of students and faculty from coast to coast.

ISI is concerned that the lower court's opinion retards the evolution of traditional academic freedom. ISI believes that this represents a threat to our aims and to our respected institutions of higher education. Most importantly, it threatens the students who, as leaders of the next generation, must be adequately equipped to deal with the innumerable challenges they will face. ISI is convinced that the shaping of these minds must continue to take place in a forum open to an extensive collection of viewpoints.

ISI requests this Court to grant the Petition For Writ Of Certiorari and examine the standard enunciated by the court of appeals. Upon review, ISI urges the Court to reverse the decision of the appeals court, and restore academic freedom the protection it has traditionally enjoyed under the First Amendment.

## SUMMARY OF THE ARGUMENT

Amici strongly endorse the concept of academic freedom put forth in the petition for certiorari. Amici are concerned,

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[1] Pursuant to Rule 37.6 of this Court, *amicus* hereby states that this brief was authored entirely by counsel for Amicus Curiae Intercollegiate Studies Institute. No person or entity other than amicus curiae made a contribution to the preparation or submission of this brief. Pursuant to Rule37.3(a), both parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

however, with the test applied by the Third Circuit to Petitioner's in-class comments and suggested extracurricular reading materials. The test adopted by the court of appeals lowers individual speech in the classroom, and by extension the concept of academic freedom, to an unprecedented level. While amici acknowledge the need for universities to retain discretion in curriculum decisions, the protections advanced by Petitioner does not infringe upon, nor implicate a university's right to determine the contours of the curriculum, or the methods by which it is taught.

This case presents an opportunity for this Court to answer two distinct, yet interrelated, questions regarding academic freedom at the University level. First, amici contend that, while a university has broad discretion in hiring decisions, what classes will be offered, reviewing syllabi of courses, and monitoring teaching methods, this discretion does not extend to censoring a professor's comments and supplemental reading materials on topics that the professor and the University have deemed not only relevant, but also integral to the course.

Such a regime flies in the face of both the First Amendment and the concept of academic freedom that this Court has espoused. Guidance is necessary for the courts below in order to clarify that while the government may determine the contours of curriculum, a professor's interaction with the curriculum within those contours is protected under the First Amendment.

Alternatively, this case provides an opportunity for this Court to determine whether a professor's in-class speech and suggested reading is government speech when the University has adopted a collective bargaining agreement which specifically guarantees that each professor is "entitled to freedom in the classroom in discussing their subject," and "should make every effort to indicate that they are not speaking for the university." Amici contends the collective bargaining agreement clarifies the nature of the classroom and the status of the speaker as under the protective umbrella of the First Amendment.

Based upon the University's clear intent to promote a diversity of views, and its specific policy as expressed in the

collective bargaining agreement that professors do not speak for the university, this Court need only decide that when public universities have clear policies establishing the freedom of professors teaching their subject, the professor enjoys First Amendment protection for in-class curriculum-related comments and suggested supplemental out-of-class reading materials.

If American universities are to continue as the preeminent marketplaces of ideas, professors must be free to interact with students and curriculum without fear that expression of a disfavored viewpoint may result in sanction or dismissal. The theory of academic freedom envisioned by the Respondent and validated by the Third Circuit would permit the government to cast a "pall of orthodoxy" over university classrooms, and in the process, inflict grave injury to the marketplace of ideas.

## ARGUMENT

### I. THE FIRST AMENDMENT DOES NOT PERMIT A GOVERNMENT UNIVERSITY TO SUPPRESS A PROFESSOR'S SPEECH MADE IN THE COURSE OF INTERACTING WITH STUDENTS AND CURRICULUM BASED SOLELY UPON THE VIEWPOINT OF THE SPEECH.

#### A. The Third Circuit was incorrect in its holding that any academic freedom rights protected by the First Amendment are exclusively enjoyed by the University.

This Court has held that academic freedom is a "special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). According to the Third Circuit, however, the First Amendment does not apply to a professor's in-class comments or suggested reading materials relevant to topics within university-approved curriculum.[2] If this

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[2] Throughout this brief amici refer to Dr. Edwards' "in-class comments" and "suggested reading materials" offered within "university-approved curriculum." There is nothing in the record to argue that the comments made by Petitioner were not relevant to the course or that the subject matter being discussed was "in contravention of school policy or dictates." *See* Petition for

view is correct, the concept of academic freedom only extends to the institution and not to individual professors.[3] Under this approach academic freedom under the First Amendment is only concerned with the government's right to control curriculum, including the right to micro-manage classroom discussion on topics the University has deemed relevant. This is contrary to numerous opinions of this Court and lower courts. *See Keyishian*, 385 U.S. at 589; *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Weiman v. Updegraff*, 344 U.S. 183 (1952); *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1290 (1997); *Silano v. Sag Harbour*, 42 F.3d 719 (2d Cir. 1994); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993); *Bishop v. Arnov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989).[4]

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Writ of Cert. at A-6. To the contrary, the record is replete with testimony that the subject was appropriate. The syllabus for the course was reviewed by expert witnesses at trial. In addition, Dr. Edwards had previously been praised by Respondent and his department head for his syllabus. *See* Petition for Writ of Cert. at 2 n.1, 3 n.2 & 5 n.4. Further, the suggested reading list offered by Dr. Edwards was not mandatory. Dr. Edwards ordered the books so that students could review the material outside of class at their discretion to facilitate discussion in the classroom on Unit III (Bias and Censorship). *See id.* at 4 & App. D

[3] For a thorough discussion of the conflicting interests at stake in academic freedom cases see Elizabeth Mertz, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 NW. L. REV. 492 (1988).

[4] These cases reflect a well-settled proposition that curriculum-related speech by teachers does implicate the First Amendment. While they do not command a particular result in this case, they stand in direct contradiction to the Third Circuit's "per se" rule that professor has *no* First Amendment rights relating to in-class, curriculum-related speech. *See* Petition For Writ of Cert. at A-6. For a discussion on the numerous conflicting tests employed by the courts of appeals see *id.* at 16-21.

This Court has recognized that the academic freedom rights of the institution are not absolute when in conflict with the free speech rights of students. *See Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969). *See also Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985). There is no doubt that courts can and should review decisions

The Third Circuit was unambiguous in its definition of academic freedom when it held that the "four essential freedoms' that constitute academic freedom have been described as a university's freedom to choose 'who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Petition for Writ of Cert. at A-8. Unfortunately, this definition recognizes only one of many components that comprise the concept of academic freedom. The court of appeals' reliance solely on the "university's freedom" is misplaced. This Court has stated that academic freedom has been commonly understood as "the principle that *individual instructors* are at liberty to teach that which they deem to be appropriate in the exercise of *their* professional judgment." *Edwards v. Aguilard*, 482 U.S. 578, 585 n.6 (1987) (emphasis added).[5] Thus, at the very least, it can be argued that academic freedom includes the right of both universities *and* professors to be free from laws or policies that "cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603.[6]

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of universities to ensure that accepted academic norms are followed and professional judgment is exercised. *See id.* at 225. This Court has never determined that a university has unbridled discretion with regard to decisions affecting students or professors. To the contrary, this Court has held that academic freedom does apply to individual professors. *See Healy v. James*, 408 U.S. 169 (1972). *See also Keyishian*, 385 U.S. at 589; *Sweezy*, 354 U.S. at 234; *Wieman*, 344 U.S. at 183.

[5] In *Edwards* the Court affirmed the use of this definition as conclusive evidence that the purpose underlying the act in question was a sham. 482 U.S. at 584-5. The fact that *Edwards* was in a secondary school setting even bolsters the point. Academic freedom has always been more limited in public secondary schools than in colleges and universities. *See id.* Thus, if the Court endorsed this definition of academic freedom applicable at the secondary school level, a definition appropriate at the University level must be at least as protective.

[6] The Seventh Circuit has noted the conflicting uses of the term "academic freedom" by stating:

> "It [academic freedom] is used to denote both the freedom of the academy to pursue its end without interference from the government . . . and the freedom of the teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict."

Amici implore this Court to reject the newly discovered narrow version of academic freedom put forth by the court of appeals and seize this opportunity to restore the traditional concept of academic freedom by striking a balance between the rights of the university and individual.[7] This result will preserve the University as a genuine marketplace of ideas, which is the purpose for which the concept of academic freedom was originally designed to secure.[8]

B. The Court should grant the petition in order to distinguish between the University's right to choose courses and shape curriculum, and the professor's freedom to interact with students and the curriculum within the general guidelines set by the University.

The chief purpose of academic freedom and the "special concern of the First Amendment," *Keyishian*, 385 U.S. at 603, is that a robust exchange of ideas occurs in the classroom.[9] Thus,

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*Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625, 629 (7th Cir.), cert. denied, 474 U.S. 1007 (1985).

In *Piarowski*, the court of appeals wrestled with the conflict between the institution and individual. The court ruled in favor of the University. At no point, however, did the Seventh Circuit entertain the idea that as a threshold matter, the institution's academic freedom rights were absolute. To the contrary, the court of appeals spent its opinion attempting to strike a balance between the rights of the University and the professor.

[7] By calling on this Court to "strike a balance," amici do not imply that a balancing test is necessary to accomplish this goal. On the contrary, amici urge that the Court find a balance by recognizing a bright-line separating areas within the scope of university regulation, and areas subject to the professional judgment of the professor. *See infra*, note 13. *See also* Donna Prokop, *Controversial Teacher Speech: Striking a Balance Between First Amendment Rights and Educational Interests*, 66 S. CAL. L. REV. 2533 (1993).

[8] The Court has described the University as "peculiarly the marketplace of ideas." *See Keyishian*, 385 U.S. at 603. *See also Barenblatt v. United States*, 360 U.S. 109, 112 (1959) ("[W]hen academic freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain.").

[9] For academic freedom to have any substance, speech in the classroom must at minimum implicate the First Amendment. *See* J. Peter Byrne,

when a university invokes academic freedom as recognized by the First Amendment, it is essential that it be for the purpose of promoting a diversity of viewpoints. When a university invokes academic freedom as a pretext for censoring a disfavored viewpoint, it reaffirms the necessity for a standard of academic freedom that guarantees professors discretion when exploring topics within the subject matter of their courses.

The crux of the conflict between the Petitioner and Respondent lies in the wording of the Third Circuit's holding that a professor "does not have a First Amendment right to decide what will be taught in the classroom." Petition for Writ of Cert. at A-6. This language is misleading for two reasons. First, the dispute between the Petitioner and Respondent is not over what will be taught. The subject being taught was obviously approved by the University.[10] Further, it is undisputed that the topics of bias and censorship were relevant to the course. *See id.* at 2 n.1, 5 n.4 & D-2. The University did not object to the subject-matter being taught by Petitioner. The only objection made by Respondent was to Dr. Edwards' use of "doctrinaire material" "of a religious sort" in connection with the unit on bias and censorship. *Id.* at 3.

The record does not indicate that the University had any policy prohibiting professors from offering suggested reading materials on topics that are integral to a course. To the contrary, to the extent that any policy was in effect, it was exactly the opposite. The official University position stated that "[a] faculty member is entitled to freedom in the classroom in discussing his/her subject," and "faculty members are entitled to freedom in the selection of textbooks, audio/visual aids and other teaching aids." Petition for Writ of Cert at 3. The contention that Dr.

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*Academic Freedom: A "Special Concern" of the First Amendment*, 99 YALE L.J. 251 (1989) (discussing reasons why First Amendment protection is indispensable to genuine academic freedom).

[10] Dr. Edwards regularly taught Introduction to Educational Media, which has been offered by the University since at least 1980. *See* Petition for Writ of Cert. at D-1.

Edwards' actions were in "contravention of school policy" is without merit. *See id.* at A-6.

Second, the Third Circuit opinion implies that Dr. Edwards is claiming a First Amendment right to usurp the University's undisputed authority to make administrative decisions regarding the content of curriculum. *See id.* at A-6 ("A public university professor does not have a First Amendment right *to decide what will be taught in the classroom.*") (emphasis added). This is simply not the case. There are numerous academic decisions that must be made in order to assemble information and ideas and deliver them to students in a proficient manner. These decisions range from very broad (whether to offer a course) to very narrow (what questions to ask on the final exam). The simple question posed by this case is whether at some point between the extremes the government relinquishes authority to the individual professor.[11]

For a professor to enjoy genuine academic freedom, some freedom must be retained at the classroom level. And, if the professor retains any academic freedom in the classroom, it must encompass the right to freely interact with students while discussing his subject, which includes suggesting outside reading materials relevant to his course. If this is not the case, then the Third Circuit was correct in its holding that the University may exercise absolute control of the content of each course at every level.[12] This would include the power to review and censor everything that is said or read both inside or outside

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[11] Amici suggest that in order for academic freedom to remain beneficial in practice the First Amendment must require the University to relinquish authority to the professor at some point. Fortunately for Petitioner, and this Court, in the present case Respondent has voluntarily chosen that point by voluntarily granting broad authority to its faculty in the classroom.

[12] By "level," amici mean "decision-making level" ranging from who to hire to what questions to ask on a final exam. Arguably, the University could assign a committee to review grades given by the professor and adjust them without regard to the professor's professional judgment. This scheme would certainly violate traditional academic norms. *See Regents of the Univ. of Mich.*, 474 U.S. at 225.

of the classroom by the professor and conceivably even the students.

Amici contend that the Third Circuit was mistaken. This case presents an excellent opportunity for the Court to clarify the First Amendment principle of academic freedom that, while reinforcing the University's traditional role as guardian of the marketplace of ideas, will foster a free exchange of ideas and viewpoints in the classroom. Amici implore the Court to take this opportunity to reject the change in law proposed by the Third Circuit and continue to protect both the institution's right to determine what will be taught, and the instructor's freedom to interact within those parameters.[13]

C. Alternatively, even if a university could regulate a professor's in-class comments and supplemental reading materials on university-approved topics, it may not do so solely on the basis of viewpoint.

Even if a court concluded that a university can regulate the content of a professor's comments and the selection of suggested reading materials relevant to his course, the First Amendment could not permit the public university to do so based upon viewpoint.[14] "Discrimination against speech because of its

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[13] Amici do advocate any specific test. *But see* Rachel E. Fugate, Comment, *Choppy Waters Are Forecast For Free Speech*, 26 FLA. ST. L. REV. 187, 215 (Fall 1998) (proposing a new test to be used in academic freedom cases). Amici do suggest that traditional academic norms, including policies and definitions set forth in the 1940 *Statement On Academic Freedom and Tenure*, [hereinafter 1940 *Statement*] would be a solid foundation on which to construct a principled standard. *See McConnell v. Howard Univ.*, 818 F.2d 58, 64 n.7 (D.C. Cir. 1987) (citing numerous cases that rely significantly on the 1940 *Statement*). *See also* Irwin H. Polishook, *Academic Freedom and Academic Contexts*, 15 PACE L. REV. 141 (1994) (noting that academic freedom is recognized in university manuals and faculty handbooks and incorporated into union contracts for academic faculty throughout the country).

[14] Respondent's approach is tantamount to a university deciding to offer a course on the Fourteenth Amendment, approving a syllabus which includes a section on privacy rights, allowing a professor to devote a lecture to *Griswold v. Connecticut*, then prohibiting the professor from discussing the dissenting opinions written in that case.

message is presumed to be unconstitutional." *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, 828-29 (1995) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 635 (1994)).[15]

The Court in *Rosenberger* held that a university's decision to deny funds to a student newspaper with religious content while approving funds for newspapers with dissimilar viewpoints violated the First Amendment. *See* 515 U.S. at 837. The dissent argued that so long as many viewpoints were silenced, no viewpoint discrimination was committed and, thus the First Amendment was not violated. *See Rosenberger*, 515 U.S. at 863 (Souter, J., dissenting). Respondent's actions in this case fail to meet either standard. The University did not instruct Dr. Edwards to "cease and desist" from discussing a variety of viewpoints concerning bias and censorship. Respondent simply ordered him to refrain from discussing his subject from a religious viewpoint.

The University went one step further. In addition to the ban on in-class comments from a religious perspective, it prohibited Dr. Edwards from suggesting outside reading materials written from a religious viewpoint. Respondent even canceled Dr. Edwards order for all books written from the

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[15] Even if the University could exclude general subject matter from a course regardless of its relevance or importance, it may not approve inclusion of a topic and then suppress particular viewpoints. "When the government targets not subject matter but particular views taken by speakers on a subject, the violation is all the more blatant" *Rosenberger*, 515 U.S. at 829 (citing *R. A. V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)). The holding in *Rosenberger* narrows the inquiry to two questions: Does the professor speak as the University or as a private speaker?; and, did the University commit viewpoint-based discrimination? *See* 515 U.S. at 834.

Here, the University would have to argue that its written policy did not intend to promote a diversity of viewpoints in its classes, and thus the University acted as "government speaker" when it censored Dr. Edwards' use of extra-curricular materials based upon one particular viewpoint. Both traditional academic norms and the University's own academic freedom policy demonstrates that the opposite is true in both instances.

disfavored viewpoint. Thus, the University's notion of academic freedom encompasses the absolute right to censor a professor's curriculum-related comments inside the classroom, as well as which viewpoints are appropriate for students to survey outside the classroom.

The Court has made it clear in the case of public secondary schools that, even when an institution has broad discretion over what is read or taught in the classroom, it may not limit the sphere of information available outside the classroom. *See Board of Educ., Island Trees Union Free Sch. Dist. v. Pico* 457 U.S. 853 (1982). *See also Griswold v. Connecticut*, 381 U.S. 479, 482 ("[T]he State may not, consistent with the spirit of the First Amendment, contract the spectrum of available knowledge.") If middle and high school aged children have the right to access to a variety of viewpoints (even over the objections of parents and the school board), then certainly college-aged adults of much more maturity have the right to access materials representing a variety of viewpoints on topics the University has deemed relevant to a course it voluntarily chose to offer.[16]

By restricting Dr. Edwards' comments solely because of their alleged religious viewpoint, Respondent's actions transgress the most fundamental principle of the First Amendment. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 95 (1972). The Court has recognized that a public university is a "traditional sphere of free expression." *Keyishian*, 385 U.S.

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[16] Amici do not intend to suggest that a university must supply students with materials from all available viewpoints. However, if the common practice is to acquiesce to faculty requests when purchasing supplemental reading materials, it cannot violate that practice simply because it disfavors a particular viewpoint. Certainly, a university may make an administrative decision not to purchase certain books for its library based on a variety of reasons that comport with the Constitution. However, amici believe this case more closely resembles a removal of books than an initial decision not to purchase them.

at 605. the University classroom should be regarded as the core of free expression on college campuses.[17] Since the Court refers to universities as "peculiarly the marketplace of ideas", the University classroom should not be stripped of its all-important status because "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation." *Sweezy*, 354 U.S. at 250.[18]

## II. THE IN-CLASS COMMENTS AND SUGGESTED LITERATURE OF A PROFESSOR AT A PUBLIC UNIVERSITY CANNOT BE CONSTRUED AS GOVERNMENT SPEECH WHEN THE SPEECH IS MADE AND LITERATURE IS OFFERED WHILE INTERACTING WITH STUDENTS AND UNIVERSITY-APPROVED CURRICULUM, AND THE UNIVERSITY HAS GUARANTEED ACADEMIC FREEDOM TO ITS FACULTY UNDER A COLLECTIVE BARGAINING AGREEMENT

### A. The University, as expressed by the collective bargaining agreement, makes clear that a professor

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[17] Amici do not attempt to downplay the value of free speech on college campuses outside the classroom. On the contrary, the academic freedom of institutions, professors, and students in all facets of university life is indispensable to a healthy marketplace of ideas. Still, the term "academic freedom" by its very definition refers to the academic process which occurs for the most part in the classroom. *See* Matthew Finkin, *Intramural Speech, Academic Freedom and the First Amendment*, 66 TEX. L. REV. 1323 (1988).

[18] This Court's admonishment in *Rosenberger* is ominously appropriate in this case:

> Vital First Amendment principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based upon some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.

515 U.S., at 835.

> does not speak for the university when making in-class comments or utilizing supplemental teaching aids relevant to topics within university-approved curriculum.

The Third Circuit incorrectly concluded that Dr. Edwards' in-class speech and selection of extracurricular reading materials was attributable to the University. The Respondent specifically contradicted that position when it declared in writing that when professors teach "they are not speaking for the university." AMERICAN ASSOC. OF UNIVERSITY PROFESSORS (AAUP), 1940 *Statement on Academic Freedom and Tenure* in AAUP, *Policy Documents and Reports* 3, 4 (1990) [hereinafter 1940 *Statement*]. As the basis for its conclusion, the Third Circuit relied on a passage from *Rosenberger* which reads: "[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking . . . ." 515 U.S. at 833-34. The Court went on to state in *Rosenberger*, however, that when a university "expends funds to encourage a diversity of viewpoints" it may not discriminate based upon viewpoint. *Id.*

For the Third Circuit's holding to pass muster it must follow that a professor's in-class speech and suggested reading lists should be taken as directly and deliberately representative of the school. This conclusion is inconsistent with the University's stated policy, as well as the premises and traditions of American higher education. Respondent acknowledged that it is governed by a written collective bargaining agreement (CBA) adopting the 1940 *Statement*.[19] *See* Petition for Writ of Cert. at 3. Respondent's adherence to the CBA clearly demonstrates the nature of the speaker. The CBA, adopting the 1940 *Statement*, states: "[B]ecause the public may judge their profession and their institution by their utterances the college or university

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[19] For a thorough discussion of the 1940 *Statement* see *Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles*, William W. Van Alstyne, ed., LAW & CONTEMP. PROBS., Summer 1990, at 1. (includes nine articles on academic freedom with emphasis on AAUP policy).

teacher should . . .make every effort to indicate that they are not speaking for the university." 1940 *Statement* at 3. Thus, whatever argument that could be made that a professor speaks for the University in these circumstances is obliterated by the University's own specific written policy. *See* Petition for Writ of Cert. at 3.[20]

It is also important to note that students understand that professors are not expected to read from university-approved scripts. Professors must be able to express viewpoints on topics relevant to their courses as well as respond to viewpoints expressed by students. Professors must also answer questions extemporaneously. Under the Respondent's concept of academic freedom, it would be acceptable to require professors to submit class notes and lecture materials for approval from the University or require students to submit questions to professors before class in order for the professor to prepare a response and gain approval from the University before being allowed to answer.[21]

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[20] The Court has wisely recognized that college students are sufficiently mature to disassociate the speech of individuals from the position of the university. *See Widmar* v. *Vincent* 454 U.S. 263, 274 n.14 (1981); *Tilton v. Richardson*, 403 U.S. 672, 686 (1971). *Cf. Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (same factors also true of high school students). Although the Third Circuit disagrees, the University policy regarding the freedom of its faculty demonstrates that it does not view them as "mere government actors paid to articulate a specific government position" as in *Rust v. Sullivan*, 500 U.S. 173 (1991). Petition for Writ of Cert. at 26. To the contrary, the University went out of its way to voluntarily grant virtually unbridled discretion in all areas of instruction. *See id.* at 3-7. Clearly, the University intended to promote a "diversity of views" within the classroom and among its faculty, and adopted policies to that end. *See id.* at 26.

[21] Further, if a university can censor a professor's in-class comments relating to his subject, and suggested reading lists outside of class, what about discussions with students in his office during office hours? Outside of office hours? It is obvious that the Third Circuit's holding is incompatible with academic freedom as it has been traditionally defined, as well as the First Amendment. *See Keyishian*, 385 U.S. at 603 ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us. That freedom is therefore a special concern of the First

Moreover, the court of appeals' reasoning and result ultimately would place universities themselves under immense pressure. If professors are deemed to speak for the University, and the University fails to censor what is said on its behalf, then the University could be held to have endorsed the speech. If this is the case, not only do universities endorse a wide variety of sometimes incompatible positions on various issues, they can expect constant pressure from within and without to engage in viewpoint censorship in a host of individual cases. As President Lowell of Harvard University stated in a famous speech during World War I, resisting pressure from alumni to dismiss a pro-German professor:

> If a university or college censors what its professors may say, if it restrains them from uttering something that it does not approve, it thereby assumes responsibility for that which it permits them to say. This is logical and inevitable, but it is a responsibility which an institution of learning would be very unwise in assuming.

Lowell, *A Lawrence Lowell on Academic Freedom in Wartime*, in 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 879 (R. Hofstader & W. Smith eds. 1961).

Even absent an established policy guaranteeing academic freedom to its professors, the court of appeals' conclusion that a professor speaks as the university when making in-class comments or suggesting out-of-class reference materials relating to university-approved topics evaporates under the most minimal scrutiny. Students understand that professors have individual viewpoints on matters relating to their subjects. Fellow professors are aware that each individual fellow faculty member is not a mouthpiece for the University's official position. In this case, according to the CBA, the University is unambiguous in its expectation that its professors make clear that they do not speak for the University.

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Amendment, which does not tolerate laws that cast a shadow of orthodoxy over the classroom.")

It seems the court of appeals is the only group under the mistaken impression that a professor's interaction with approved curriculum through in-class comments and supplemental teaching aids is government speech. The traditional understanding of a professors' academic freedom in the classroom, and the specific written policy of the University dictates otherwise. The court of appeals should be corrected in this case because "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

B. The University, through it adoption of the collective bargaining agreement, grants broad discretion to its faculty to express viewpoints and utilize supplemental materials on matters relevant to their courses.

Even if, under normal circumstances, a university reserves the right to put content-based or viewpoint-based restrictions on a professor's in-class speech and suggested reference materials, Respondent has waived that right by adopting a collective bargaining agreement that guarantees academic freedom to its faculty. At the heart of the dispute between Dr. Edwards and the University is the portion of the CBA which states in pertinent part: "Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject." Petition for Writ of Cert. at 3. As discussed earlier, Respondent did not contend that the comments or materials had no relation to the subject. *See id.* at 3. It is conceivable, however unlikely, that due to the single complaint lodged by one student, who did not testify at trial, Respondent might argue that the material was "controversial." But even so, under the CBA, the material must bear "no relation to [the] subject" before a professor is expected to refrain from including it. *See id.* at A-3.

Furthermore, to even suggest that avoiding controversy is a sufficient interest to justify viewpoint-based discrimination strains credulity. For "school officials to justify prohibition of a particular expression of opinion, [the school] must be able to

show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 509 (1969).[22] To hold as the court of appeals did, that a viewpoint may be singled out because it alone has produced a student complaint, strikes at the very heart of the First Amendment.

It is unclear why the Third Circuit failed to even mention the CBA in its opinion.[23] *See* Petition for Writ of Cert. at 3 n.2. Despite this conspicuous omission, amici suggest that the CBA states the University's unequivocal intention as to the nature of the classroom and the speaker. The University could not have been more clear when it declared that faculty members have "extraordinary latitude" in decisions regarding whether certain materials are relevant to a course. *See id.* at 3. It stands to

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[22] This Court has made it clear that the First Amendment will not countenance a "heckler's veto":

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling affects as it presses for acceptance of an idea. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to a standardization of ideas.

*Terminello v. City of Chicago*, 337 U.S. 1, 4 (1949).

[23] The University's adoption of the CBA undoubtedly has a transforming effect. This Court has noted that adoption of the 1940 *Statement* by a sectarian institution supports the conclusion that the school was "characterized by an atmosphere of academic freedom rather than religious indoctrination." *Tilton v. Richardson*, 403 U.S. 672, 681-2 (1971). And the fact that "[e]ach college subscribes to, and abides by, the 1940 *Statement* . . ." demonstrates that the Catholic colleges receiving an annual state subsidy were not pervasively sectarian. *Roemer v. Board of Public Works of Md.*, 462 U.S. 736, 756 (1976). *See also Minnesota Higher Educ. Facilities Auth. v. Hawk*, 232 N.W.2d 106, 109 (Minn. 1975) (holding that private colleges benefitting from tax-exempt revenue were non-sectarian because "the colleges all adhere to the 1940 *Statement* . . .")

reason that students enjoy at least as much "freedom in learning" as professors do "freedom in teaching" as espoused in the CBA. Thus, the University has unavowedly declared its classrooms an arena intended for the open exchange of viewpoints between professors and students.

The Third Circuit's opinion omitting any reference to the University's defiance of the CBA warrants review and reversal.

C. When a public university grants broad academic freedom rights to its faculty, it may not selectively revoke that grant based upon the viewpoint being expressed.

While there is considerable scholarship on the subject of academic freedom, both in theory, and under the Constitution, there appears to be little or no scholarship discussing a public university's selective revocation of a prior delegation of academic freedom.[24] Admittedly, there is some debate regarding whether a university must delegate some authority over academic decisions to its faculty. It does not follow, however, that if a university is not required to delegate, it has absolute discretion in revoking any delegations made prior. *See* Petition for Writ of Cert. at 27.

The University's actions in this case are analogous to the school board's actions in *Pico*. 457 U.S. at 853. While the books at issue in this case had not yet been purchased, nor placed in the library, they had been ordered. *See* Petition for Writ of Cert. at 5. The University had a longstanding policy of granting the requests of faculty members for supplemental class materials. *See id.* In addition, the CBA states that "faculty members are entitled to freedom in the selection of textbooks, audio/visual aids and other teaching aids." *Id.* at 3.

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[24] *See e.g.*, Nathan Glazer, *Academic Freedom in the 1990's*, 22 WM. MITCHELL L. REV. 479 (1996); Gregory A. Clarick, *Public School Teachers and The First Amendment: Protecting The Right To Teach*, 65 N.Y.U. L. REV. 693 (June 1990); *The Academy and the Courts: A Symposium On Academic Freedom*, 16 U.C. DAVIS L. REV. (Summer 1983) (compilation of seven articles each addressing a different aspect of academic freedom).

Nevertheless, upon receipt of a single complaint by one student, who did not testify at trial, the University ordered Dr. Edwards to "cease and desist" from employing twenty-four titles of "suspect materials" in the teaching of his class. Petition for Writ of Cert. at 4. The Court held in *Pico* that despite the significant interests of parents and the school board, the school board was prohibited from removing the books. 457 U.S. at 853. While the University may be free to approve or disapprove which books it buys for its library or what materials it orders for its bookstore, this administrative authority, necessitated by a scarcity of resources, does not include the power to restrict Dr. Edwards from offering a list of books as suggested reading on the topic of bias and censorship because of their viewpoint.[25]

The only conclusion one can draw from the University's actions is that it revoked the academic freedom it had delegated to Dr. Edwards through the CBA. There is no other evidence that the University intended to terminate its adherence to the CBA as to any other professor. Therefore, it can be deduced that the University intended to continue its adherence to the CBA except as to Petitioner. Like the University in *Rosenberger*, Respondent defied its specific written policy in order to suppress one viewpoint from one speaker. 515 U.S. at 819. The only explanation for this selective discrimination was that the Respondent wished to censor one of the viewpoints being expressed in Dr. Edwards' class. *See* Petition for Writ of Cert. at 3-6.

A government ban of books based upon a single objection by an alleged student to the viewpoint of the books is inconsistent with the First Amendment and harmful to the intellectual freedom necessary to sustain a free society.

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[25] Respondent did not simply invoke its administrative authority and refuse to allocate resources for Dr. Edwards' book order (though this action would also be suspect under the First Amendment if done solely on the basis of viewpoint). Respondent also prohibited Dr. Edwards from utilizing or suggesting any of the materials in discussing his subject even, arguably, if he purchased the books himself and placed copies on reserve in the library for student examination.

Freedom is abridged by those who object to a particular viewpoint "each ripping a page from this book, then that, until the day came when the books were empty and the minds were shut and the libraries closed forever." RAY BRADBURY, FAHRENHEIT 451 149 (Ballantine Books 1979) (1953).

Selective academic freedom is an oxymoron. If the University reserves the right to revoke the CBA at will, and only as to one professor or one viewpoint, then academic freedom under the CBA is a sham. *See Edwards v. Aguilard* 482 U.S. 578 (1987) (holding that statute that limited a teacher's discretion was antithetical to the statute's stated purpose of academic freedom). The University's own "primary guiding document" belies its arguments in the lower courts.

Accordingly, amici strongly urge this Court to reaffirm the Constitution, more specifically the First Amendment, as the "primary guiding document" to carry out its most basic function- to guarantee an unrestricted marketplace of ideas- and restore academic freedom to a position worthy of the American system of higher education.

## CONCLUSION

For the foregoing reasons the Court should grant the Petition For Writ Of Certiorari.

Respectfully Submitted,

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IN THE

# Supreme Court of the United States

October Term 1998

DILAWAR M. EDWARDS, Ph.D.,

*Petitioner,*

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; JOHN PIERCE WATKINS, Ph.D., President; Nancy Z. Nelson, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed.D., Dean, in their official capacities; DAVID CAMPBELL, Chairperson, Educational Studies Dept.,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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## STATEMENT OF THE CASE

### The Respondents Distort the Factual Background of the Case

Respondents erroneously assert that this case is about Petitioner being prevented from using classroom materials which the University "decided had no bearing on the education course which he had been assigned to teach." Br. 1.

The record is clear that the materials in dispute were relevant to the subject of the course. Petitioner presented the testimony of three experts in education who so testified. Pet. 4-5. Petitioner's syllabi for the course won praise from his former Department head, and a commendation from one of the Respondents. Pet. 2-3, n. 1. A national accrediting organization found nothing wrong with the syllabus created by Petitioner, which contained the reading list banned by the Respondents. *Id.* The Court of Appeals made no finding that the disputed materials were inappropriate. Pet. A-6-9.

Unit three, which contained the matter deemed objectionable by the Respondents, dealt with, among other things, censorship and bias in the selection of textbooks and classroom materials. One of the Respondents admitted that such matters are appropriate for that class. Pet. 5, n. 4.

Because it cannot be said that Petitioner's materials "ha[ve] no relation to his/her subject," the written policies of the University contained in the Collective Bargaining Agreement ("CBA") ceded the authority to chose, and use, those materials to the Petitioner. Pet. 3.

Further, the unanimous testimony at trial was that Dr. Edwards did not use the materials, or his class, as a pulpit for his own personal views on religion, and that his own religious views were not even apparent to his students. Pet. 4.

Rather, the actions of the Respondents, from top to bottom, were motivated by a desire to suppress the use of materials because of their viewpoints; viewpoints which, as

the Court of Appeals noted, had been forbidden by the University as constituting "'doctrinaire material[s]' of a religious nature." Pet. A-3. By revoking, solely on viewpoint factors and solely as to Petitioner only, the benefits of a forum[1] created so that faculty could freely chose, and use, their own class materials, the University officials violated the First Amendment. *Perry Educational Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 49, n. 9 (1983).

The record is replete with evidence not only of viewpoint censorship and book-banning by the University, but of outright religious bigotry against Dr. Edwards because of the perception by the administrators that he belonged to the "fundamentalist" religious "spectrum." Pet. 6.

The Respondents further distort the record by asserting that Petitioner "revised the course syllabus to include materials advocating the teaching of 'creationism' and attacking the teaching of evolution..." Br. 1. By Respondents' reasoning we should conclude that a professor of Russian history becomes an advocate of communism by having his students read *Das Kapital*. Such a conclusion is absurd. Petitioner was simply exposing his students, in a class unit dealing with issues of bias and censorship in class materials selection, to those issues having currency in public debate. Pet. 4, n. 3.

If this Court did not feel that the threat of communism was a sufficient and necessary cause to infringe academic freedom under the First Amendment in *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967), surely Dr. Edwards exposing students to the public controversy surrounding the teaching of evolution, or community objections to "humanism" in textbooks is no greater threat to the Republic.

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[1] A "forum" can be one which exists "more in a metaphysical than in a spatial or geographical sense, but the same principals apply." *Rosenberger v. University of Va.*, 515 U.S. 819, 132 L.Ed.2d 700, 716 (1995), citing *Perry Ed. Assn., supra.*

Nor are Respondents correct that the University received complaints from "students" about Petitioners' teaching of unit three of the class. Br. 1. The Court of Appeals noted that "*one* of Dr. Edwards students complained to University officials . . ." Pet. A-3 (emphasis added).

Respondents are further inaccurate in asserting that "petitioner failed to comply with the administration's request" regarding the disputed materials. Br. 1. In fact, Petitioner ceased using the disputed materials that were on the list of banned materials, a fact that points out the chilling effect of the University's "cease and desist" order. When Respondent Watkins demanded that Petitioner stop using the disputed "handouts," App. Vol. I, at 339-348, Dr. Edwards complied. App. Vol. IV, Tr. Feb. 20, at 103. When Dean Nelson demanded that he use a broader base of materials, Dr. Edwards complied. *Id.* At 93. Dr. Edwards even invited the administrators to observe his teaching. *Id.*, at 118.

In fact, Dr. Edwards consistently sought guidance from the University officials on what books and materials were being banned, and the definition of their phrase "doctrinaire material of a religious sort," so that he could steer clear of the prohibited areas. App. Vol. I, at 368 (memo to Respondent Nelson); *Id.*, pgs. 382-383 (memo to University President Watkins). This risk of a tenured professor, like Dr. Edwards, being coerced to "stay as far as possible from utterances or acts which might jeopardize his living" was at the root of this Court's development of the concept of academic freedom. *Keyishian*, at 385 U.S. 601.

Respondents minimize the manner in which Petitioner was suspended from his teaching duties, indicating that "petitioner claimed he was unprepared" to discuss the concerns of his superiors over the issue, thus prompting the suspension. Br. 2. In fact, as the Court of Appeals observed, the Respondents mailed the packet of materials relating to their charges against Dr. Edwards on the Friday preceding the Monday meeting. Pet. A-5. This virtually insured that Petitioner would not have them when he went to work on

Monday, the same day on which the Respondents would first notify Dr. Edwards of the fact of the hearing being conducted against him. Dr. Edwards did not know the *nature* of the charges until he walked into the hearing.

## REASONS FOR GRANTING THE WRIT

### The Respondents Misconstrue the Law

Respondents wrongly argue that the Court of Appeals' decision involved the narrow issue of the right of a University to determine its own "curriculum." Br. 4. Both the Third Circuit opinion and the Respondents fail to distinguish between the University's right to determine *curriculum* (i.e. the general course of study offered) and the professor's right (under the CBA) to determine the precise materials and matters covered in a specific *course*.[2]

Apart from that, the University had already determined in the CBA that individual "*faculty*" had the right to determine the precise teachings, discussions, and materials to be used in a given course. Pet. 3. Respondents citation to *Rosenberger v. University of Va.*, 515 U.S. 819, 132 L.Ed.2d 700 (1995) is unavailing. There this Court noted:

> The University does acknowledge (as it must in light of our precedents) that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional . . ."

132 L.Ed.2d at 716. However, the issue presented by this case, never before decided by this Court, is whether the delegation of decision-making on the content of class materials to professors represents a situation akin to "encourag[ing] a diversity of views" rather than creating a situation where the class materials are deemed "the

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[2] See: *The New Merriam-Webster Dictionary* (1989):"Curriculum: . . . a course of study offered by a *school or one of its divisions*." Compare: "*Course: ... a series of instruction periods dealing with a subject.*"

University's own speech" for First Amendment purposes. *Id.* at 718. None of the Supreme Court cases cited by Respondents, Br. 4-5, ever decided that.

Respondents argue that the "substantial departure" rule of *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) was not argued before the Third Circuit. Br. 5. But the Third Circuit based its decision on *Ewing*, even though none of the parties (including Respondents) cited or relied on it.

Respondents are flatly wrong in asserting (Br. 5, n. 2) that the First Amendment rights of public employees require the showing of a "property" or "liberty" interest (confusing it with the Fourteenth Amendment due process context), and the cases cited simply do *not* say that.

Respondents' assertions that there is a consensus of opinion among the circuits, and that the "only" curriculum-related case cited by the Petitioner is *Bishop v. Aranov*, 926 F.2d 1066 (11th Cir. 1991) *cert. denied* 505 U.S. 1218 (1992) are both plainly incorrect.

Not addressed in Respondents' brief are cases vindicating the First Amendment rights of professors in classroom-related expression, which were cited by Petitioner: *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971-972 (9th Cir. 1996)(sexual harassment policy of university violated First Amendment rights to classroom speech); *Parate v. Isibor*, 868 F.2d 821, 827-828 (6th Cir. 1989)(university interference with professor's assignment of student grade unconstitutional). *Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994) is noted by the Respondents (Br. 6) but they fail to address the holding in the case that the expression of the professor, including his in-class discussions are protected by the First Amendment.

As for *Bishop v. Aranov*, *supra*, the Court of Appeals itself noted the apparent conflict between *Bishop* and the Third Circuit. See: Pet. A-7.

Lastly, Respondents opine that the result in this case would have been the same even if the Third Circuit had engaged in the balancing test required by *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), Br. 7, n. 3. Because Petitioner's case was supported by the unanimous testimony of three experts and three students, and Respondents' hostile animus was undeniably viewpoint based, and the jury was given no guidance for the key constitutional factor to be decided, that argument is meritless.

## CONCLUSION

For the foregoing reasons we request that this Court grant the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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